TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 100

W. P. BROWN & SONS LUMBER COMPANY ET AL.,
PETITIONERS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

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[fol. 1] [Caption omitted.]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

W. P. Brown & Sons Lumber Company, a Corporation; Edward Hines Yellow Pine Company, a Corporation; H. C. Berckes, Assignee of Claims of Wausau Southern Lumber Company, Marathon Lumber Company, Lehr Lumber Company, Long-Bell Lumber Company, Henderson-Molpus Company, Eastman-Gardner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Natalbany Lumber [fol. 2] Company, Ross C. Smith and Hampton S. Smith, Trading and Doing Business under the Firm Name of Acme Lumber & Coal Company; Adams-Edgar Lumber Company, a Corporation, Successor to the Adams-Banks Lumber Company, a Corporation; E. B. Teague, J. E. Chandler & B. L. Frost, Trading and Doing Business under the Firm Name of Advance Lumber Company; The American Lumber & Export Company, a Corporation; Bagdad Land & Lumber Company, a Corporation; Birmingham Lumber Company, a Corporation; Burdette Lumber Company, a Corporation, Successor to McGinnis-Burdette Lumber Company, a Corporation; Albert Russell and T. R. Simmons, Trading and Doing Business under the Firm Name of Cleveland Lumber Company; W. R. Cochran, Executor of the Estate of C. W. Cochran (deceased), Trading and Doing Business under the Firm Name of C. W. Cochran Lumber Company; C. G. Duffee, Trading and Doing Business under the Firm Name of Duffee Lumber Company; Foster Creek Lumber & Manufacturing Company, a Corporation; A. J. Gray and E. W. McKinley, Trading and Doing Business under the Firm Name of Jefferson Lumber Company; O. D. Carlton, H. H. Hill, and J. T. Carlton, Trading and Doing Business under the Firm Name of King Lumber Company, a Partnership; S. E. Lackey, J. L. Lackey, and V. R. Lackey, Trading and Doing Business under the Firm Name of S. E. Lackey Lumber Company; M. E. Leake and R. F. Goodlett, Trading and Doing Business under the Firm Name of Leake & Goodlett; John J. Laumer

and J. M. Griffith, Trading and Doing Business under the Firm Names of Laumer Lumber Company and Laumer-[fol. 3] Griffith Lumber Company; Magic City Lumber Company, a Corporation; T. R. Miller Mill Company, Inc., a Corporation; J. W. Oden and J. J. Elliott, Trading and Doing Business under the Firm Name of Oden-Elliott Lumber Company; L. F. Garrett, Trading and Doing Business under the Firm Name of Pocahontas Lumber Company; The Pioneer Lumber Company, a Corporation, Reid Lumber Company, Inc., a Corporation; Schuster Springs Lumber Company, a Corporation; Jay Smith Lumber Company, a Corporation; Steel City Lumber Company, a Corporation; The Standard Lumber Company, a Corporation; West Florida Lumber Company, a Corporation; Wisconsin-Alabama Lumber Company, a Corporation; The Adams-Newell Lumber Company, a Corporation; L. A. Baker, Trading and Doing Business Formerly under the Firm Name of Baker-Dyer Lumber Company, Now under the Firm Name of Baker Lumber Company; Frost-Sibley Lumber Company, a Corporation; W. B. Harbeson Lumber Company, a Corporation; Watters-Tonge Lumber Company, a Corporation; Henry C. Brabston, Trading and Doing Business under the Firm Name of Henry Brabston & Company; The Parker Lumber Company, a Corporation; John F. Andrews, Trustee in Bankruptcy of Pine & Cypress Manufacturing Company, a Corporation; Nadawah Lumber Company, a Corporation; J. R. Thames, Trading and Doing Business under the Firm Name of J. R. Thames & Company; W. M. Carney Mill Company, a Corporation; [fol. 4] A. J. Lowry, C. C. Brownless, H. L. Haughton, J. P. Warner, Edwin S. Jack, and E. B. May, Trading and Doing Business under the Firm Name of Greensboro Lumber Company; E. V. Sanders, Trading and Doing Business under the Firm Name of E. V. Sanders Lumber Company; C. H. Sims and L. W. Morgan, Trading and Doing Business under the Firm Name of Sims-Morgan Lumber Company; D. F. Southard, J. B. Southard and B. M. Southard Trading and Doing Business under the Firm Name of Southard Lumber Company; Williams Yellow Pine Company, a Corporation; The First National Bank of Birmingham, Executor of the Estate of

E. A. Smith, Swift-Hunter Lumber Company, a Corporation, Plaintiffs,

vs.

Louisville & Nashville Railroad Company, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Company, Apalachicola Northern Railroad Company, Atlanta & Saint Andrews Bay Railway Company, Atlanta and West Point Railroad Company, Atlanta, Birmingham & Atlantic Railway Company (B. L. Bugg, Receiver), Atlantic Coast Line Railroad Company; The Baltimore & Ohio Railroad Company; Bessemer and Lake Erie Railroad Company, Birmingham Southeastern Railroad Company, Birmingham, Selma and Mobile Railroad Company, Buffalo, Rochester and Pittsburgh Rail-
[fol. 5] way Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessee), Central of Georgia Railway Company, Chattahoochee Valley Railway Company, The Chesapeake and Ohio Railway Company, The Chicago and Alton Railroad Company (William W. Wheelock and William G. Bierd, Receivers), Chicago and Eastern Illinois Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Indianapolis and Louisville Railway Company, Chicago, Milwaukee and St. Paul Railway Company (H. E. Byram, M. W. Potter, and E. J. Brundage, Receivers), Chicago, Peoria and St. Louis Railroad Company (William Cotter, Receiver), The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, Indianapolis & Western Railroad Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Cincinnati Northern Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Detroit, Toledo and Ironton Railroad Company, Erie Railroad Company, Evansville, Indianapolis & Terre Haute Railway Company, Georgia, Florida & Alabama Railway Company, Georgia Railroad, Georgia

Southern and Florida Railway Company, Glenmora & Western Railway Company, Grand Trunk Railway Sys-
[fol. 6] tem, The Green County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, The Hocking Valley Railway Company, Illinois Central Railroad Company, Jackson and Eastern Railway Company, Kosciusko and South Eastern Rail Road Company, The Lake Erie and Western Railroad Company, Lehigh Valley Railroad Company, Louisville, New Albany & Corydon Railroad Company, The Michigan Central Railroad Company, The Minneapolis & St. Louis Railroad Company (W. H. Bremner, Receiver), Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Mississippian Railway, Missouri-Illinois Railroad Company, Missouri Pacific Railroad Company, Mobile and Ohio Rail Road Company, The Monongahela Railway Company, Morgan's Louisiana and Texas Railroad and Steamship Company, Muscle Shoals, Birmingham and Pensacola Railroad (W. B. Harbeson, Receiver), The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, New York, Ontario and Western Railway Company, Norfolk and Western Railway Company, Northern Alabama Railway Company, The Northern Ohio Railway Company, Pearl River Valley Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Pittsburgh, Chartiers & Youg-
[fol. 7] hiogheny Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Lisbon & Western Railroad Company, The Pittsburgh & West Virginia Railway Company, St. Louis-San Francisco Railway Company, Seaboard Air Line Railway Company, The South Buffalo Railway Company, The South Georgia Railway Company, Southern Railway Company, Sumter and Choctaw Railway Company, Tennessee Central Railway Company, Tennessee, Alabama and Georgia Railway, Toledo, St. Louis and Western Railroad Company (Walter L. Ross, Receiver), The Tuskegee Railroad Company, Wabash Railway Company, The Western Rail-

way of Alabama, The Wheeling and Lake Erie Railway Company, Winston-Salem Southbound Railway Company, The Yazoo and Mississippi Valley Railroad Company, Defendants.

PETITION—Filed February 6, 1933

The petition of the above-named plaintiffs respectfully shows:

1. That the petitioner, W. P. Brown & Sons Lumber Company, is and was at the times herein mentioned, a corporation duly organized and existing under the laws of the State of Kentucky, residing and having its principal office at Louisville, Kentucky, in the Western District of Kentucky, and chiefly engaged in the manufacture and buying and selling of lumber and other forest products.

2. That there is filed herewith, as a part hereof, marked Exhibit "A," a statement showing the names of the petitioners herein and the location of their principal offices. That said petitioners, or their assignors, are and were at the times herein mentioned, engaged in the manufacture and/or buying and selling of lumber and other forest products and in shipping same in interstate commerce. That said petitioners are joined herein as plaintiffs, under [fol. 8] and by authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented.

3. That petitioner, H. C. Berckes, is the duly appointed and acting Secretary-Manager of the Southern Pine Association, a corporation rendering services to manufacturers and dealers in lumber and forest products, among whom are and were at the times herein mentioned, the following:

Wausau Southern Lumber Company,
Marathon Lumber Company,
Lehr Lumber Company,
Long-Bell Lumber Company,
Henderson-Molpus Company,
Eastman-Gardner & Company,
Rutledge & Company,
J. R. Buckwalter Lumber Company,
Gilchrist-Fordney Company,
Natalbany Lumber Company,

That the companies aforesaid had certain claims for reparation against certain of the defendants herein, for illegal freight charges collected by said defendants on shipments of lumber and other forest products, which charges the said companies paid and bore or bore; that said companies assigned said claims to this petitioner, and this petitioner was awarded reparation thereon, by order of the Interstate Commerce Commission, against the said defendants, as hereinafter more fully set forth. That the Edward Hines Yellow Pine Company, petitioner herein, had similar claims against certain of the defendants herein and was awarded reparation by the Interstate Commerce Commission, as hereinafter appears; and that the said company has assigned to the petitioner H. C. Berckes, its claims and awards of reparation against said defendants. That H. C. Berckes is the assignee and successor of the claims and awards of the companies mentioned in this paragraph and files this his petition in his name, right and capacity, as assignee and successor of said claims and awards granted said companies.

4. That the defendant, Louisville and Nashville Railroad Company, is a corporation duly organized and existing under the laws of the State of Kentucky, with its principal office at Louisville, Kentucky, in the Western District of Kentucky, and as such corporation is now and was at the times mentioned herein, a citizen of and domiciled in the said State of Kentucky. That each of the other de- [fol. 9] fendants, named in the caption, is and was at the times herein mentioned a corporation duly organized and existing under the laws of one or more of the States of the United States, with its principal office and place of business therein, as set forth, so far as is known to petitioners, in Exhibit "B," filed herewith and made a part hereof. That the petitioners do not know and are unable to state the particular State or States of the United States wherein certain of the said corporations, as shown and indicated in Exhibit "B," were organized or wherein they were at any time, or now exist, or the particular State or States of which either of them was at any time or is now a citizen, or in which they were at any time or are now domiciled, but petitioners allege: That each of the defendants herein, at all of the times herein stated, did business as a corporation and in its corporate name, with one or more of these

petitioners; and each of said defendants, where the State in which it is organized and has its principal office is not shown herein, should and by right ought to be required either to set out fully and particularly in its answer to this petition, the particular States wherein it was incorporated and organized and wherein it is now existing, and the place of its principal office and business, and its citizenship and domicile, or each of said defendants should and of right ought to be estopped from denying its corporate existence or from requiring petitioners to allege either the place where either of said corporations was incorporated, or was at any of the times herein stated, or is now, existing, or the place of its principal office or business or domicile or citizenship; or, in lieu thereof, these petitioners should be permitted, upon leave of Court, when all of said facts are discovered, to make all necessary allegations touching such matters. That said defendants are joined herein, as defendants, under and by authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented.

5. That this suit is filed under and pursuant to the authority contained in and conferred by the Statutes of the United States and particularly the Act To Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto.

6. That the defendants are, and were at the times herein mentioned, common carriers engaged in interstate commerce by railroads, and in the business of transporting passengers and property by railroads, for hire, over their lines of railways from various points of origin east of the [fol. 10] Mississippi River and south of the Ohio and Potomac Rivers, and from points of origin in Arkansas and Louisiana, to destinations on and east of the Mississippi River, principally in Central Territory; and as such common carriers were and are subject to the provisions of the Act To Regulate Commerce, approved February 4, 1887, and all acts amendatory thereof and supplementary thereto.

7. That the several petitioners herein caused to be delivered to the several defendants herein, and the said defendants received certain carload shipments of lumber, or other forest products, for transportation and delivery at

several points of destination; and thereafter the respective defendants, operating with certain other defendants caused each of the said shipments to be delivered at the respective points of destination.

8. That the said defendants, respectively made, and collected certain charges on said shipments; that these petitioners, respectively, paid and bore, or bore the charges thereon; that said charges, so collected, were illegal and unlawful and in violation of the provisions of the Interstate Commerce Act, insofar as they exceeded the legal, and just, and reasonable rates applicable thereto, at that time in force and effect and on file with the Interstate Commerce Commission, and resulted in direct damage and injury to these plaintiffs, as hereinafter set forth. That said damage, consisting of excessive and illegal charges, were caused by the violations, by the respective defendants herein, of the provisions of the Act To Regulate Commerce as amended and supplemented, and resulted from straight overcharges and/or from misrouting.

9. That these several petitioners did file complaints before the Interstate Commerce Commission, in the cases known and designated on the Dockets of said tribunal, as follows: "W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company, et al., Docket No. 17068;" "Southern Pine Association and H. C. Berckes, Secretary-Manager thereof v. Alabama & Vicksburg Railway Company, et al. Docket No. 17858;" "Wausau Southern Lumber Company v. The Alabama Great Southern Railroad Company, et al. Docket No. 17224;" "Wausau Southern Lumber Company v. The Alabama Great Southern Railroad Company, et al. Docket No. 17298;" "American Lumber & Export Company, et al. v. The Alabama & Vicksburg Railroad Company, et al. Docket No. 17407;" and "Watters-Tonge Lumber Company, et al. v. The [fol. 11] Alabama Great Southern Railroad Company, et al. Docket No. 17957."

The complaint, bearing Docket No. 17068, was filed May 13, 1925, by W. P. Brown & Sons Lumber Company, a plaintiff herein, and covered two shipments of lumber on April 17th and August 8th, 1922, and numerous shipments thereof subsequent to May 13, 1923, from origins in Arkansas, Louisiana and Alabama to destinations on and east of the Mississippi River.

The complaint, bearing Docket No. 17858, was filed January 11, 1926, by Southern Pine Association and H. C. Berckes, Secretary-Manager thereof, a plaintiff herein, in behalf of numerous members of that association and others, as amended, and covered numerous shipments of lumber and other forest products, taking lumber rates, subsequent to 1920, including shipments pendente lite, from points in Alabama, Florida, Mississippi and Louisiana to destinations in Central Freight Association and trunk line territories.

The complaints, bearing Docket No. 17224 and Docket No. 17298, in which Wausau Southern Lumber Company, a plaintiff herein, was complainant, were filed on June 12, and July 10, 1925, respectively. Docket No. 17224 embraced 20 carloads of lumber from Laurel, Miss., to destinations in Ohio during 1924 and 1925. Docket No. 17298, as amended, embraced 125 carloads of lumber from Laurel to destinations in Ohio and New York during 1924 and 1925.

The complaint, bearing Docket No. 17407, in which American Lumber & Export Company and numerous others, plaintiffs herein, were complainants, was filed August 6, 1925, and covered numerous shipments of lumber of said complainants subsequent to August 6, 1922, including shipments pendente lite, from origins in Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina and Tennessee, to destinations east of the Mississippi River.

The complaint, bearing Docket No. 17957, in which Watters-Tonge Lumber Company, and numerous others, plaintiffs herein, were complainants, was filed January 21, 1926, and covered numerous shipments of lumber and other forest products taking lumber rates, of numerous complainants, subsequent to March 1, 1920, from origins in Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Tennessee to destinations east of the Mississippi River.

That these several petitioners, in said complaints, complained of the foregoing alleged violations of the Act [fol. 12] To Regulate Commerce and prayed (1) that the respective defendants named therein might be severally required to answer the charges therein contained; (2) that after due hearing and investigation an order or orders be made requiring the respective defendants to cease and de-

sist from exacting the illegal and unlawful charges aforesaid; and (3) that further order or orders be made requiring defendants to pay unto the respective complainants or to their assignee or assignees, by way of reparation for the unlawful charges herein described, such sum or sums as, in view of the evidence to be adduced therein, the said Interstate Commerce Commission should find the respective shippers had been damaged by the existence of the illegal and unlawful charges, on all shipments, made by them within the several periods therein severally specified, and until the date of the Commission's final order in the several proceedings; and (4) that such further order or orders might be made as the Commission might deem proper in the premises and as the plaintiffs' causes might appear to require.

Whereupon the aforesaid being at issue upon the several complaints and answers on file with the Interstate Commerce Commission and statements of the details of all such shipments, showing, among other things, date of shipment, the car number and initial, origin, destination, date of payment of freight, bill of lading routing, route of movement, weight, rate and amount of freight paid, rate and amount that should have been paid under the findings of the Commission, the amount of reparation due on the basis of the Commission's decisions, the original freight bills or true copies thereof, bills of lading and other evidence were duly submitted and offered as proof of damages before the Interstate Commerce Commission; and having been duly heard together, on order of the Commission, and having been submitted by the parties thereto, a full investigation of the matters and things involved therein having been had, the Commission did, on February 9, 1932, make an order authorizing and directing the several defendants herein to pay unto the several plaintiffs herein, on or before April 26, 1932, sums set opposite their respective names, as shown in said order, with interest on the respective amounts at the rate of 6 per cent per annum from the respective dates the charges were paid, as reparation on account of inapplicable rates charged for the transportation, or on account of the misrouting, as the case might be, of [fol. 13] numerous carloads of lumber, and other forest products taking lumber rates, from the various origin points to the various points of destination, hereinabove re-

ferred to. That a certified copy of the aforesaid order and opinion of the Interstate Commerce Commission is attached hereto and made a part hereof, marked Exhibit "C," wherein is shown the amounts of reparation awarded to each of the petitioners herein, respectively, as damages, and the names of the several defendants herein against whom said reparation awards were granted. In support of said order, there is filed herewith the Transcript of Evidence taken in said cases before the Interstate Commerce Commission and upon which said order is based.

10. That certain of the defendants herein did not comply with the aforesaid order of the Interstate Commerce Commission within the time limit set in such order. That subsequent to the said time limit and within the last few weeks, some of the defendants herein have paid some of the items of the reparation awarded by the Commission in and by the order aforesaid; that other items are in the process of settlement; but that the petitioners at the present time are not advised as to all of the items that are in the process of settlement, and therefore cannot at this time set forth accurately the said items. But petitioners say that on or before the day of trial of this case they will amend this their petition and will eliminate all items herein set forth in Exhibit "C" which have been paid at that time. That as to those items which have not been paid at this time the respective defendants herein continue to refuse to pay to the respective petitioners herein the sums herein set forth and specified in the order aforesaid.

11. Petitioners say that on or before the day of trial of this case they will file herein a statement covering all items of damages awarded which have not been paid at that time, showing (1) the name of the shipper, petitioner herein, who paid and bore or bore the illegal charges aforesaid; (2) item of shipment; (3) date shipped; (4) date charges were paid; (5) car initial and number; (6) point of origin; (7) destination; (8) routing, together with tariff authorities; (9) rates as charged, showing rate authority, weight and amount charged and collected; (10) rates that should have been charged, showing rate authority and amount; and (11) amount of reparation awarded by the Interstate Commerce Commission on each of said items.

Petitioners say that the reparation awards are listed in and are contained in the order of the Interstate Commerce [fol. 14] Commission, copy of which is filed herewith and made a part hereof, marked Exhibit "C," and can be easily identified therein; that said order shows the name or names of the defendant or defendants against which said awards were granted and said order is here referred to for the purpose of identifying the several defendants against whom the said awards were granted respectively.

Wherefore, petitioners pray that they may respectively recover from the respectively designated defendants the amounts set opposite their respective names in the table contained in and made a part of the order aforesaid of the Interstate Commerce Commission, filed herein as Exhibit "C," said amounts aggregating the sum of $32,974.77, with interest on the said several amounts therein set forth, at the rate of 6 per cent per annum from the respective dates the transportation charges were collected, as specified in the order of the Interstate Commerce Commission, and that an order be issued commanding the said defendants to pay, on or before a date certain, such sums set opposite their respective names, as have not been paid, together with interest as aforesaid, and that your petitioners be allowed a reasonable attorney's fee, to be fixed by the Court and taxed and collected against the several defendants herein in such proportions as the several amounts of reparation awarded against them respectively appears to the total amount of the judgments herein, as a part of the causes of this suit, and as is authorized by the statute in such case made and provided, and for their costs and disbursements in this action, and asks for process against the defendants.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs.

[fol. 15] PLAINTIFF'S EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 17224 [1]

WAUSAU SOUTHERN LUMBER COMPANY

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Submitted May 6, 1930. Decided February 9, 1932

On further hearing, reparation awarded certain complainants on carload shipments of lumber, and other forest products taking lumber rates, from points east of the Mis-

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[1] This report also embraces No. 17068, W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company et al.; No. 17298, Same v. Alabama Great Southern Railroad Company et al.; No. 17407, American Lumber and Export Company et al. v. Alabama & Vicksburg Railway Company et al.; No. 17858, Southern Pine Association v. Alabama & Vicksburg Railway Company et al.; No. 17957, Watters-Tonge Lumber Company et al. v. Alabama Great Southern Railroad Company et al.; No. 19522, South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 1), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 2), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 3), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Atlantic Coast Line Railroad Company et al.; No. 19522 (Sub-No. 4), South Bend Chamber of Commerce for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 5), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; and No. 19522 (Sub-No. 6), South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.

sissippi River and south of the Ohio and Potomac Rivers, [fol. 16] and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River, principally in central territory, based on previous findings of inapplicability and misrouting, made in the original report, 142 I. C. C. 521, as modified in the report on reconsideration, 176 I. C. C. 787.

G. F. Graham, Norman, Quirk and Graham, A. J. Ribe, and B. M. Angell for complainants.

H. L. Walker for defendants, Southern Railway System Lines, Edw. D. Mohr, for defendant, Louisville and Nashville Railroad Company, J. H. Wright for defendant, Illinois Central Railroad Company, William Burger for defendants, Mobile and Ohio Railroad Company, Louisville and Nashville Railroad Company, and Southern Railway System lines, and J. T. Quisenberry for defendants, Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, and Gulf and Ship Island Railroad Company.

Report of the Commission on Further Hearing

By the COMMISSION:

Exceptions were filed by complainants to the report proposed by the examiner.

In the original report herein, 142 I. C. C. 521, we found with reference to numerous carload shipments of lumber, and other forest products taking lumber rates, from points east of the Mississippi River and south of the Ohio and Potomac Rivers, and from points in Arkansas and Louisiana, to destinations on and east of the Mississippi River, principally in central territory; (1) that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates, over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation, and where the charges collected were in excess of such applicable rates, the shipments were overcharged; (2) that those shipments which were delivered by complainants to defendants with complete routing instructions

to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted and that com- [fol. 17] plainants were damaged thereby to the extent the charges collected were in excess of those applicable over the routes designated; and (3) that those shipments, which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and were forwarded over routes over which higher rates applied than would have been applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instructions, as the case might have been, were misrouted, and that complainants were damaged thereby to the extent the charges collected were in excess of those applicable over such lowest-rated available routes. We directed the refund of the overcharges and the payment of damages resulting from the misrouting by the defendants responsible therefor and dismissed the complaints.

Refund of overcharges and payment of damages by reason of the misrouting were made by some defendants, but other defendants refused to do so. On December 13, 1928, these cases were set for further hearing with respect to the amount of reparation due complainants under the findings in the original report, which further hearings were held on January 28 and April 1, 1929. Through oversight an order reopening these cases for further hearing was not entered at the time of the entry of the order setting the cases for further hearing, and on May 3, 1929, we entered a nunc pro tunc order vacating the order of dismissal theretofore entered and reopening the cases as of December 13, 1928, with respect to the amount of reparation due complainants under the findings in the original report.

In 176 I. C. C. 787, on reconsideration, we modified the original report as to the applicable rates over certain routes on shipments embraced in Nos. 17407 and 17957 to destinations on the Chesapeake and Ohio Railway Company, Maysville, Ky., to Kanawha City, W. Va., inclusive, and to Ironton, Ohio. Pertinent details of the several complaints are set forth in the appendix.

At the hearings, the complainants in Nos. 17224, 17068, 17298, 17407, 17958, and 17957, enumerated in the findings hereinafter, other than Southern Pine Association, sub-

mitted evidence [2] showing that they made certain shipments [fol. 18] of lumber, and other forest products taking lumber rates, from and to the points and during the periods covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon. As a rule complainants, the consignors, sold the shipments f. o. b. destinations, the consignees paying the charges and deducting some from complainants' invoices. The other shipments were sold f. o. b. origins, complainants prepaying the freight charges and receiving no reimbursement therefor. These complainants also submitted statements, covering these shipments, in the form prescribed by Rule V of the Rules of Practice, supported in most instances by paid freight bills and other transportation papers. Freight bills pertaining to a few shipments were not offered in evidence due to the fact that the carriers with whom they had been filed had not returned them to complainants. No evidence as to the making of shipments or the paying and bearing of charges was offered in behalf of the other complainants in Nos. 17407, 17858, and 17957, or in behalf of the complainant in Nos. 19522 and 19522 (Sub-Nos. 1 to 6, inclusive). Defendants offered no evidence.

Evidence was offered as to some shipments delivered more than two years prior to the filing of the respective formal complaints and as to others delivered more than three years prior thereto. Claims based on misrouting of shipments which were delivered more than two years prior to the filing of the respective formal complaints and those based on inapplicability as to shipments which were deliv-

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[2] By agreement of the parties proof by the following complainants was made by affidavits: Bagdad Land and Lumber Company; Foster Creek Lumber and Manufacturing Company; Frost-Sibley Lumber Company; W. B. Harbeson Lumber Company; West Florida Lumber Company; Schuster Springs Lumber Company; Wisconsin-Alabama Lumber Company; M. E. Leake and R. F. Goodlett; trading as Leake & Goodlett; T. R. Miller Mill Company, Incorporated; O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as King Lumber Company; and S. E. Lackey, J. L. Lackey, and V. R. Lackey, trading as S. E. Lackey Lumber Company.

ered more than three years prior to the filing of the respective formal complaints, except those protected from the running of the statute by the filing of informal complaints, are barred.

In No. 17407, complainants the King Lumber Company and the S. E. Lackey Lumber Company are described as corporations. There is no evidence as to shipments by such corporations, but evidence as to certain shipments was offered in behalf of O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as the King Lumber Company, and in behalf of S. E. Lackey, J. L. Lackey, and V. R. Lackey, [fol. 19] trading as the S. E. Lackey Lumber Company. Defendants did not object to the receipt of evidence as to these shipments. No point has been raised as to the variance between the designation of these concerns as corporations in the complaint and the proof that they were actually individuals operating under the trade names shown in the complaint as corporate titles. The variance being one which could readily be corrected by amendment of the complaint, Key v. Goodall, Brown & Co., 7 Ala. A. 227; Stange v. Price, 191 Ky. 734; and the incorrect designation of these complainants manifestly not having misled defendants, in any way in the absence of objection we may ignore it, and consider the description of these firms as corporations as relating to the individual members who comprise the two firms doing business as styled in the complaint.

Certain complainants offered evidence as to alleged overcharges with respect to demurrage, reconsignment, switching, and transit charges. These charges are not in issue in these proceedings and are not covered by our findings in the prior reports, and no award of reparation may be made here concerning them. Evidence was offered by certain complainants in No. 17407 relating to one shipment from Stamps, Ark., and three shipments to Omaha, Nebr. The complaint in No. 17407 does not cover shipments from Stamps or shipments to Omaha, and reparation may not be awarded as to these shipments. As to three shipments of complainant W. B. Harbeson Lumber Company in No. 17407, the evidence shows that complainant did not pay or bear the charges thereon. Complainants, Eastman-Gardiner & Company, Gilchrist-Ford-

ney Company, Rutledge & Company, Lehr Lumber Company, and Marathon Lumber Company, in No. 17858 offered evidence as to certain shipments, which originated on the line of the New Orleans and Northeastern Railroad Company and were misrouted by that carrier, or, as to some shipments, by a connecting carrier, The Alabama Great Southern Railroad Company. Neither of these carriers are defendants in No. 17858, and no award of reparation may be made as to these shipments.

As to some of the shipments shown to have been misrouted, we are unable to determined whether the misrouting was occasioned by defendants on whose lines the respective shipments originated or by defendants who handled them as intermediate carriers. The shippers completely routed some of the shipments, partially routed [fol. 20] others, and as to still others furnished no routing instructions. Certain complainants urge that reparation for this misrouting be awarded against the initial and intermediate carriers jointly. To support a joint award against defendants, there must be joint liability, which is not shown here and, under ordinary circumstances, does not exist in cases of misrouting. An initial carrier, receiving a shipment for transportation, impliedly contracts with the shipper to forward it over the cheapest reasonably available route compatible with the shipper's routing instructions, if any. It is, therefore, obligated to route the shipment and to deliver routing instructions to its connecting carrier. Compare Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co., 18 I. C. C. 485, 488, and Atlantic Lumber Co. v. Louisville & N. R. Co., 163 I. C. C. 598. In view of this obligation and the fact that evidence as to the responsibility of the initial and intermediate carriers for misrouting is entirely within the control of the carriers, we are of the opinion that proof that a shipment is misrouted anywhere before reaching its destination is sufficient to establish a prima facie case against the initial carrier. Inasmuch as the initial carrier has not rebutted the prima facie case of misrouting made against it, reparation as to these shipments will be awarded against the defendants on whose lines the shipments originated.

Complainant Southern Pine Association offered in evidence assignments in its favor of the rights to reparation on shipment embraced in No. 17858 of Wausau South-

ern Lumber Company, Henderson-Molpus Company, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, complainants therein. The complaint in No. 17858 as to shipments of complainant Wausau Southern Lumber Company is sufficiently broad to cover the shipments of that complainant in Nos. 17224 and 17298, and reparation on all shipments of the Wausau Southern Lumber Company, concerning which evidence was offered in these proceedings, will be awarded to the assignee by virtue of the assignment executed by it. Subsequent to the filing of the complaint in No. 17407, the corporate name of McGinnis-Burdette Lumber Company, complainant therein, has been changed to Burdette Lumber Company.

We find that complainants, W. P. Brown & Sons Lumber Company, a corporation, in No. 17068, Ross C. Smith and [fol. 21] Hampton S. Smith, trading as Acme Lumber and Coal Company, The Adams-Banks Lumber Company, a corporation, The Adams-Newell Lumber Company, a corporation, E. B. Teague, J. E. Chandler, and B. L. Frost, trading as Advance Lumber Company, The American Lumber and Export Company, a corporation, Bagdad Land and Lumber Company, a corporation, L. A. Baker, trading as Baker-Dyer Lumber Company, Birmingham Lumber Company, a corporation, Burdette Lumber Company, a corporation, under its former name of McGinnis-Burdette Lumber Company, Albert Russell and T. R. Simmons, trading as Cleveland Lumber Company, C. W. Cochran, trading as C. W. Cochran Lumber Company, C. G. Duffee, trading as Duffee Lumber Company, Foster Creek Lumber and Manufacturing Company, a corporation, Frost-Sibley Lumber Company, a corporation, W. B. Harbeson Lumber Company, a corporation, A. J. Gray and E. W. McKinley, trading as Jefferson Lumber Company, O. D. Carlton, H. H. Hill, and J. T. Carlton, trading as King Lumber Company, S. E. Lackey, J. L. Lackey, and V. R. Lackey, trading as S. E. Lackey Lumber Company, H. E. Leake and R. F. Goodlett, trading as Leake & Goodlett, John J. Laumer and J. M. Griffith, trading as Laumer Lumber Company and Laumer-Griffith Lumber Company, Magic City Lumber Company, a corporation,

T. R. Miller Mill Company, Incorporated, J. W. Oden and J. J. Elliott, trading as Oden-Elliott Lumber Company, L. F. Garrett, trading as Pocahontas Lumber Company, The Pioneer Lumber Company, a corporation, Reid Lumber Company, Incorporated, Schuster Springs Lumber Company, a corporation, Jay Smith Lumber Company, a corporation, Steel City Lumber Company, a corporation, The Standard Lumber Company, a corporation, West Florida Lumber Company, a corporation, and Wisconsin-Alabama Lumber Company, a corporation, in No. 17407, Watters-Tonge Lumber Company, a corporation, Henry G. Brabston, trading as Henry G. Brabston & Company, The Parker Lumber Company, a corporation, Pine & Cypress Manufacturing Company, a corporation, Nadawah Lumber Company, a corporation, J. R. Thames, trading as J. R. Thames & Company, W. M. Carney Mill Company, a corporation, A. J. Lowry, C. C. Brownlee, H. L. Haughton, J. P. Warner, Edwin S. Jack, and E. B. May, trading as Greensboro Lumber Company, E. V. Sanders, trading as E. V. Sanders Lumber Company, C. H. Sims and L. W. Morgan, trading as Simms-Morgan Lumber Company, The First National Bank of Birmingham, a [fol. 22] corporation, executor of the estate of E. A. Smith, deceased, D. F. Southard, J. B. Southard, and B. M. Southard, trading as Southard Lumber Company, Swift-Hunter Lumber Company, a corporation, and Williams Yellow Pine Company, a corporation, in No. 17957, and Edward Hines Yellow Pine Company, a corporation, in No. 17858, made shipments of lumber, and other forest products taking lumber rates, from and to the points and during the periods covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those that would have accrued at the rates found applicable in the prior reports over the routes of movement, or over the routes the shipments should have moved, and are entitled to reparation, with interest, from the defendants named in the accompanying order and in the amounts therein shown.

We further find that complainant Wausau Southern Lumber Company, a corporation, in Nos. 17224, 17298, and 17858, and complainants Henderson-Molpus Com-

pany, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, in No. 17858, made shipments of lumber, and other forest products taking lumber rates, from and to the points and during the period covered by our findings in the prior reports, some of which shipments were overcharged and the others misrouted, and paid and bore or bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those that would have accrued at the rates found applicable in the prior reports over the routes of movement, or over the routes the shipments should have moved; that Southern Pine Association, a corporation, complainant in No. 17858, has succeeded to the rights of the said Wausau Southern Lumber Company, Henderson-Molpus Company, Eastman-Gardiner & Company, Rutledge & Company, J. R. Buckwalter Company, Gilchrist-Fordney Company, Marathon Lumber Company, Natalbany Lumber Company, Lehr Lumber Company, and Long-Bell Lumber Company, to reparation herein and is entitled to an award of reparation against defendants and in amounts as shown in the accompanying order.

[fol. 23] Reparation to complainants in Nos. 17407, 17858, and 17957, other than those to whom an award of reparation is made herein-above, is denied.

An order awarding reparation to the complainants entitled thereto under the above findings will be entered in Nos. 17224, 17068, 17298, 17407, 17858, and 17957. The complaints in Nos. 19522 and 19522 (Sub-Nos. 1 to 6, inclusive), will be dismissed.

BRAINERD, Commissioner, concurring in part:

In the report on reconsideration I concurred in the award of reparation for the reason that I was of the opinion that while the rates charged were applicable, they were nevertheless unreasonable. In the instant report, I am unable to agree with the conclusions of the majority as to the fact of misrouting; in the opinion that the facts shown in the instances specifically dealt with establish a prima facie case of misrouting against the initial carrier; or to the awards of reparation based thereon.

LEE, Commissioner, concurring in part:

I concur in the conclusions of the majority, except in the award of reparation, on account of misrouting, against the intial carriers.

There was what may be termed a proper route over which each of the shipments should have moved, and, since the carriers are required to collect the published rate applying over the route of movement, any deviation of a shipment from the proper route ordinarily constitutes a misrouting which entitles the shipper to the damages resulting therefrom. The shipments were delivered to the initial carriers for transportation beyond their lines. They were shown to have been misrouted, but, and this is an important material fact not stated in the majority report, the misrouting of the shipments, that is, the actual deviation from the proper routes, occurred after the shipments had moved beyond the rails of the initial carriers, and occurred either on the line of an intermediate carrier or on the delivery of the shipments by such carrier to one of its connections. In fact, the record discloses on which one of the intermediate carriers the deviation occurred in each instance. To my mind it appears equally as probable that the misrouting was occasioned by the act or omission of an intermediate carrier as that it was due to dereliction on the part of an initial carrier. The initial carrier may have furnished proper [fol. 24] routing instructions in delivering the shipments to the intermediate carriers, and the latter may have failed to follow them. Or the initial carrier may have failed to furnish the intermediate carrier any routing instructions, in which event the intermediate carrier, by accepting the shipments without routing instructions, assumed responsibility for the subsequent routing. Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co., supra. I doubt, therefore, if mere proof that a shipment was misrouted "anywhere before reaching its destination" justifies the inference or presumption that the initial rather than an intermediate carrier was responsible therefor. In view of the additional proof that the deviation did not occur on the lines of the initial carriers, but that it was the intermediate carriers that actually transported the shipments over the higher rated routes, the award should be made against the intermediate carriers on whose lines the misrouting occurred. Evidence disclosing responsibility for the misrout-

ing is as much within the control of the intermediate as the initial carriers. And, since it is the actual deviation of the shipments that resulted in damages, evidence showing that the intermediate carriers, and not the initial carriers, transported the shipments over higher rated routes, it seems to me, should be held to constitute a prima facie case against such intermediate carriers on whose lines the deviation occurred.

Commissioner Tate did not participate in the disposition of these cases.

Appendix

Details of Complaints

Nos. 17224 and 17298, in which Wausau Southern Lumber Company, a corporation, is complainant, were filed on June 12, and July 10, 1925, respectively. No. 17224 embraces 20 carloads of lumber from Laurel, Miss., to destinations in Ohio during 1924 and 1925. No. 17298, as amended, embraces 125 carloads of lumber from Laurel to destinations in Ohio and New York during 1924 and 1925.

No. 17068, filed May 13, 1925, and in which W. P. Brown & Sons Lumber Company, a corporation, is complainant, covers two shipments of lumber on April 17 and August 8, 1922, and numerous shipments thereof subsequent to May 13, 1923, from origins in Arkansas, Louisiana, and Alabama to destinations on and east of the Mississippi River.

[fol. 25] No. 17407, filed August 6, 1925, covers numerous shipments of lumber of numerous complainants subsequent to August 6, 1922, including shipments pendente lite, from origins in Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Tennessee to destinations east of the Mississippi River.

No. 17858, filed January 11, 1926, by Southern Pine Association, a corporation, in behalf of numerous members of that association and others, as amended, covers numerous shipments of lumber, and other forest products taking lumber rates, subsequent to 1920, including shipments pendente lite, from points in Alabama, Florida, Mississippi, and Louisiana to destinations in central freight association and trunk-line territories.

No. 17957, filed January 21, 1926, covers numerous shipments of lumber, and other forest products taking lumber rates, of numerous complainants subsequent to March 1, 1920, from origins in Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Tennessee to destinations east of the Mississippi River.

Nos. 19522, 19522 (Sub-No. 1), 19522 (Sub-No. 2), 19522 (Sub-No. 3), 19522 (Sub-No. 4), 19522 (Sub-No. 5), and 19522 (Sub-No. 6), the first four filed on April 4, 1927, and the others on May 7, 1927, and in which South Bend Chamber of Commerce, in behalf of St. Joseph Valley Lumber Company, is complainant, cover seven carloads of yellow pine lumber between October 30, 1923, and October 25, 1926, from origins in Alabama to destinations in Illinois, Michigan, Indiana, and New York.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of February, A. D. 1932.

No. 17224

Wausau Southern Lumber Company

v.

Alabama Great Southern Railroad Company et al.

No. 17068

W. P. Brown & Sons Lumber Company

v.

Alabama Great Southern Railroad Company et al.

[fol. 26] No. 17296

Wausau Southern Lumber Company

v.

Alabama Great Southern Railroad Company et al.

No. 17407

AMERICAN LUMBER AND EXPORT COMPANY et al

v.

ALABAMA & VICKSBURG RAILWAY COMPANY et al

No. 17858

SOUTHERN PINE ASSOCIATION

v.

ALABAMA & VICKSBURG RAILWAY COMPANY et al

No. 17957

WATTERS-TONGE LUMBER COMPANY et al.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

No. 19522

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 1)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 2)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

[fol. 27] No. 19522 (Sub-No. 3)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

ATLANTIC COAST LINE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 4)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 5)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

No. 19522 (Sub-No. 6)

SOUTH BEND CHAMBER OF COMMERCE, FOR ST. JOSEPH VALLEY LUMBER COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

It appearing, That on May 8, 1928, the commission made and filed its report in the above-entitled proceedings, and that on May 3, 1929, the commission reopened these proceedings as of December 13, 1928, for further hearing with respect to the amount of damages and reparation due complainants under the findings in said report:

And it further appearing, That said further hearings has been had and that the commission, on the date hereof, has made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report and the report of May 8, 1928, are hereby referred to and made a part hereof:

It is ordered, In Nos. 17224, 17068, 17298, 17407, 17858, and 17957, that the defendants named in each of the groups shown in the table below, be, and they are hereby, authorized and directed to pay unto the complainants, whose names are shown opposite said groups, on or before April 28, 1932, the amounts set opposite their respective names in [fols. 28-51] said table, with interest thereon at the rate of 6 per cent per annum from the respective dates the charges were paid, as reparation on account of inapplicable rates charged for the transportation of numerous carloads of lumber, and other forest products taking lumber rates, from points east of the Mississippi River and south of the Ohio and Potomac Rivers, and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River.

[fol. 52] IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 9, 1933

Come the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Rail Road Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central

Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Nothern Railroad Company, Northern Alabama Railway Company, [fol. 53] Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad Company, and without waiving the demurrer heretofore filed herein but expressly relying thereon, for answer to paragraph numbered 3 of the petition filed herein deny that the Wausau Southern Lumber Company, Marathon Lumber Company, Lehr Lumber Company, Long-Bell Lumber Company, Henderson-Molpus Company, Eastman-Gardner & Company, Rutledge & Company, J. R. Buckwalter Lumber Company, Gilchrist-Fordney Company, and Natalbany Lumber Company, or any of said companies, had certain claims or any claims for reparation against certain of the defendants herein or any of the defendants herein for illegal or any freight charges collected by any of said defendants, on shipments of lumber or other forest products; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not any of said companies hereinabove mentioned paid and bore, or bore, any freight charges collected on said shipments; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not said companies or any of them assigned said alleged claims to the petitioner, H. C. Berckes, and deny that said petitioner was awarded reparation thereon by any order of the Interstate Commerce Commission against these defendants or any of them except by an order, a copy of which is filed with the petition as Exhibit "A," and which order was and is, as defendants claim, entirely void and of no effect; and defendants deny that the Edward Hines Yellow Pine Company had similar claims or any claims for illegal or any freight charges against any of the defendants herein or was awarded reparation by the Interstate Commerce Commission except by said order which was and is, as defendants claim, entirely void and of no

effect; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not said Edward Hines Yellow-Pine Company has assigned to the petitioner, H. C. Berckes, its claims or awards of reparation against these defendants, or any of such claims or awards, or as to whether or not H. C. Berckes is the assignee or successor of any claims or awards of any of the [fol. 54] companies mentioned above and which the petitioner alleges had assigned their claims to said petitioner, H. C. Berckes.

These defendants for answer to paragraph numbered 7 of the petition filed herein deny that they have knowledge or information sufficient to form a belief as to whether or not the several petitioners herein or any of them caused to be delivered to the several defendants herein or any of them, or as to whether or not said defendants or any of them received certain car loads of, or shipments of lumber, or other forest products, for transportation or delivery at several points of destination; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not thereafter the respective defendants operating with certain or any other defendants caused each of said shipments to be delivered at the respective points of destination; and defendants deny that they have knowledge or information sufficient to form a belief as to what were the certain shipments referred to in the petition or what were any of said shipments mentioned therein.

These defendants for answer to paragraph numbered 8 of the petition filed herein deny that they have knowledge or information sufficient to form a belief as to whether or not the defendants or any of them made or collected certain charges on said shipments or as to what charges are referred to in said paragraph of the petition; and defendants deny that they have knowledge or information sufficient to form a belief as to whether or not the petitioners, or any of them, paid and bore, or bore, the charges on any of said alleged shipments; and defendants deny that said charges or any of them were illegal or unlawful or in violation of any of the provisions of the Interstate Commerce Act, or that they exceeded the legal or just or reasonable rates applicable thereto or at that time in force or effect or on file with the Interstate Commerce Commission or resulted in direct or any damage or injury to these plaintiffs or any

of them; and defendants deny that there were any excessive or illegal charges or that any damage consisting of such charges was caused by any violations by any of these defendants of the provisions of the Act To Regulate Commerce as amended and supplemented, and deny that any damage resulted from straight overcharges or from misrouting or that there were any overcharges or that there was any misrouting or any damage.

[fol. 55] Paragraph II

For further answer to the petition filed herein these defendants state that the plaintiff's action herein is a suit for the enforcement of various awards included in an order of the Interstate Commerce Commission entered on February 9, 1932, in Docket No. 17068, Docket No. 17858, Docket No. 17224, Docket No. 17298, Docket No. 17407 and Docket No. 17957, all being proceedings pending before the Interstate Commerce Commission; and that a copy of the order entered on February 9, 1932, is filed with the petition herein marked Exhibit "C."

These defendants state further that said order contains specific directions to the defendants to pay to certain of the complainants various amounts listed at the close of said order, but that said order of the Interstate Commerce Commission does not contain sufficient or necessary findings of fact upon which to base or sustain said awards of damages or any of them; and that said order does not state any of the ultimate facts from which said awards can be determined; and that said order does not show who were the shippers, who were the consignees, or the respective order in which the companies against whom the awards were made, transported such shipments; and that said order does not show as to said shipments the quantity of any of the particular shipments upon which the awards are based or the rates paid by the shipper for the service rendered, or whether or not the rates paid were in accordance with the established tariffs; and said order does not show what rates the said Commission found to be applicable to said shipments or in what tariffs said rates were published; and that said order does not show the amount of damages, if any, suffered in respect to any particular shipment or the number of shipments upon which said respective com-

plaints are allowed damages, and that said order does not show the facts as to any shipments so as to enable the court or the parties to determine what injury or damage, if any, the petitioners may have suffered as to any particular shipment; and does not state facts upon which any awards in favor of the complainants therein, petitioners herein, could be made in any sum whatever; and that said order does not include sufficient or necessary findings upon which to base an award of reparation under the Interstate Com- [fol. 56] merce Act or the amendments thereto; and that said order is therefore invalid and unenforceable in so far as it makes awards in favor of any of the complainants or against any of the defendants therein.

Paragraph III

For further answer to the petition filed herein these defendants state that the petitioners herein, or their assignors, were, as they allege, parties in Docket No. 17068, Docket No. 17858, Docket No. 17224, Docket No. 17298, Docket No. 17407 and Docket No. 17957, pending before the Interstate Commerce Commission; that between the points of origin and the points of destination involved in the complaints in all of said proceedings, there were lawfuly published through rates on lumber and articles taking lumber rates, effective at the time of all the shipments involved in said proceedings before the Interstate Commerce Commission.

These defendants further state that all of the shipments involved in said proceedings before the Interstate Commerce Commission were shipments which had been transported between points from and to which joint through rates on lumber and articles taking lumber rates had been published and were in effect; and that all of said shipments were transported over the route for said joint through rates unless the shippers directed otherwise; and that the rates charged and collected for said transportation were the legally established rates for transportation over the route of said joint through rates or over the routes on which said shipments were transported.

These defendants state further that despite the existence of said lawfully published through rates in effect at all of said times the complainants in said proceedings before the

Interstate Commerce Commission contended that Agent B. T. Jones Tariff, I. C. C. No. U. S. 1, provided for lower rates between the same points over routes different from those over which said established joint through rates applied; and that said Agent B. T. Jones Tariff contained the following provision, limiting the application of said tariff to transportation:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other Forest Products, on which rates are not higher than on [fol. 57] lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, * * *."

Defendants state further that said Agent B. T. Jones Tariff does not apply in any case where joint published through rates are in effect from point of origin to point of destination and that said Agent B. T. Jones Tariff did not apply to any of the shipments involved in said complaints before the Interstate Commerce Commission, and that the holding of the Interstate Commerce Commission to the effect that said rates would and did apply to any of said transportation was erroneous and a wrongful interpretation of the meaning of the tariff; and that said question of interpretation is purely a legal question which is subject to determination by this court, and that the Interstate Commerce Commission was in error in interpreting said Agent B. T. Jones Tariff as applicable to transportation between any points from and to which published through rates were in effect; and that any award made by the Interstate Commerce Commission based upon the interpretation of said Agent B. T. Jones Tariff as applying to transportation between points where published through rates were in effect was erroneous, unlawful, and based entirely upon a wrongful interpretation of said tariff; and that all of the claims for reparation in said proceedings before the Interstate Commerce Commission were based upon said wrongful interpretation of Agent B. T. Jones Tariff, and that therefore all awards made by said Interstate Commerce Commission in any of said proceedings were erroneous, unlawful, void and contrary to the law.

Paragraph IV.

For further answer to the petition filed herein these defendants state that the awards of reparation contained in the last paragraph of the order of February 9, 1932, filed as Exhibit "C" to the petition, are based upon the interpretation of Agent B. T. Jones Tariff, I. C. C. No. U. S. 1, as being applicable to transportation between points from and to which there were in effect at that time joint through rates, when in fact a proper interpretation would not have held said tariff as applicable to said shipments; and that said Commission then announced in its findings as follows:

[fol. 58] "As to some of the shipments shown to have been misrouted, we are unable to determine whether the misrouting was occasioned by defendants on whose lines the respective shipments originated or by defendants who handled them as intermediate carriers. The shippers completely routed some of the shipments, partially routed others, and as to still others furnished no routing instructions. Certain complainants urge that reparation for this misrouting be awarded against the initial and intermediate carriers jointly."

These defendants state that the awards of reparation based upon misrouting were therefore shown to be without evidence to indicate who was responsible for the misrouting, if any carrier, and that any award of reparation against the initial or any other carrier was therefore unauthorized, arbitrary, void and unlawful; and that none of the awards of reparation based upon misrouting have any validity or effect whatever, both because of the fact that with a proper interpretation of Agent B. T. Jones Tariff there would have been no misrouting and because there were no facts before the Commission from which the Commission could determine the responsibility for such alleged misrouting, and the Commission was therefore without authority to make such awards.

Wherefore, having fully answered, these defendants pray that the petition herein be dismissed, for their costs herein expended and for all further and proper relief.

H. L. Walker, A. M. Warren, E. D. Mohr, Trabue, Doolan, Helm & Helm, J. Blakey Helm, Edw. P. Humphrey, Marvin H. Taylor, Attorneys for De-

fendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Railroad Company, Atlanta & Saint Andrews Bay [fol. 59] Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, The Yazoo and Mississippi Valley Railroad Company.

[fol. 60] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION—Filed June 11, 1934

Comes the plaintiffs, by counsel, and by leave of Court, amend their petition herein, and for such amendment says:

1. Plaintiffs amend the seventh literary paragraph of paragraph numbered 9, in their petition herein, to read as follows:

"That these several petitioners, in said complaints, complained of the foregoing alleged violations of the Act To Regulate Commerce, and brought in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac River and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in Central Territory. Certain of the shipments were also alleged to have been misrouted. In said complaints, said petitioners prayed (1) that the respective defendants named therein might be severally required to answer to charges therein contained; (2) that after due hearing and investigation an order or orders be made requiring the respective defendants to cease and desist from exacting the illegal and unlawful charges aforesaid; and (3) that further order or orders be made requiring the defendants to pay unto the respective complainants or to their assignee or assignees, by way of reparation for the unlawful charges herein described, such sum or sums as, in view of the evidence to be adduced therein, the said Interstate Commerce Commission should find the respective shippers had been damaged by the existence of the illegal and unlawful charges, on all shipments, made by them within the several periods therein severally specified, and until the date of the Commission's final order in the several proceedings; and (4) that such further order or orders might be made as the Commission might deem proper in the premises and as the plaintiffs' causes might appear to require. Whereupon, answers having been filed and hearings had; and the Examiner of the Interstate Commerce Commission having made his proposed report and exceptions having been filed thereto, and the cases having

been orally argued and submitted, the Interstate Commerce Commission, on May 8, 1928, rendered its decision and report and found as follows:

[fol. 61] "'We find that the Cincinnati rates applied from Covington to destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western. The applicable rates on shipments to such destinations are those determined in accordance with our general conclusions elsewhere stated. There is no evidence to show that they were unreasonable.

"'We find that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates; and over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation; and that where the charges collected were in excess of such applicable rates the shipments were overcharged.

"'We further find that those shipments which were delivered by complainants to defendants with complete routing instructions to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over the routes designated.

"'We further find that these shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which were forwarded over routes over which higher rates applied than would have applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instructions, as the case may be, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over such lowest-rated available routes.

"'We further find that the rates legally applicable to the destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, embraced in No. 17957, are not shown to have been unreasonable.

"'The overcharges should be promptly refunded and the defendants responsible for the misrouting should pay to complainants the damages resulting therefrom.'

[fols. 62-83] "The said decision of the Commission is reported in 142 I. C. C. 521, and a certified copy of said report is filed herewith, as a part hereof, marked 'Exhibit X.' Pursuant to said findings and report of the Interstate Commerce Commission, certain refunds of overcharges and payments of damages by reason of misrouting were made by some defendants, but other defendants refused to make such refunds and payments. Accordingly thereafter these cases were reopened, and on December 13, 1928, they were set for further hearing with respect to the amount of reparation due complainants under the findings aforesaid, which further hearings were held on January 28 and April 1, 1929."

2. Plaintiffs amend paragraph numbered 11, in their petition herein, by adding thereto the following:

The defendants named in each of the groups in the table below (said defendants being designated by abbreviations which are explained in the Appendix to the order of the Interstate Commerce Commission filed herein and made a part hereof, marked "Exhibit C," and to which reference is here made) have paid unto the plaintiffs herein, whose names are shown opposite said groups, the amounts set opposite their respective names in said table, with interest as ordered, as reparation on account of inapplicable rates charged for the transportation of carloads of lumber, and other forest products, taking lumber rates, as ordered by the Interstate Commerce Commission, to-wit:

[fol. 84] 3. Plaintiffs further amend their complaint herein by adding Paragraph No. 12, thereto immediately proceeding the prayer thereof.

Paragraph XIII

Plaintiffs state that the rate situation that was before the Interstate Commerce Commission in his case can best be understood in the light of the circumstances which brought about such situation and by considering a representative shipment involved.

Originally rates on lumber from the pine belt in southern territory, to points north of the Ohio River, were published as separate factors to and beyond said river and the through rate was arrived at by adding such factors. Later these combinations were checked out and the lowest combination was generally published as the through one-factor rate. In June, 1919, by General Order No. 28, issued by the Director General of Railroads, rates on lumber were increased 25% subject to a maximum increase of 5 cents per hundred pounds in any rate. In order to observe this maximum when through rates were made on combination, the Director General published the so-called "Combination Rule" here involved. Briefly stated, the rule provided that where combination rates on lumber aggregated more than 25 cents each factor was to be reduced 20%, subject to a maximum reduction of 5 cents on any one factor and to the sum of the factors so reduced there should be added 3 cents. At that time the rule had application to lumber rates from the south to points north of the Ohio River only in rare instances. On August 26, 1920, the Interstate Commerce Commission, in a proceeding styled Ex Parte 74, and reported in 58 I. C. C. 220, authorized general increases in all rates, such increases being limited to a maximum of 25% in rates south of the Ohio River, 44% in rates north of the Ohio River and 33⅓% in rates applying inter-territorially. In cases where the haul up to the Ohio River was long with a high rate therefor and the haul beyond the Ohio River was short with a relatively low rate, the increase of 33⅓% in the through rate resulted in a higher rate than resulted from increasing the separate factors 25% and 40% respectively.

The railroads continued in effect the "Combination Rule," above referred to, but changed it so as to provide that it should apply only when the aggregate of the in- [fol. 85] termediate rates exceeded 33½ cents and substituted 6½ cents for the previous maximum reduction or addition of 5 cents. In 1922 when the Interstate Commerce Commission, in Reduced Rates, 1922, 68 I. C. C. 676, ordered a reduction of 10% in all rates, the "Combination Rule" was again changed to apply only when the aggregate of the intermediate rates exceeded 30 cents and the maximum reduction or addition was reduced to 6 cents.

The rule as then amended was in effect at the time of the movement of the shipments here involved.

For several years after 1920 the railroads applied the aforesaid "Combination Rule," to shipments of lumber from the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 745 and 93 I. C. C. 614.

Notwithstanding the ruling of the Interstate Commerce Commission the Southern carriers continued to refuse to apply the rule and were later joined by the northern carriers in such refusal and the shippers instituted the proceedings which resulted in the orders of the Interstate Commerce Commission, upon which this suit is brought.

A representative shipment in controversy herein, which illustrates the refusal of the southern carriers to apply the "Combination Rule" is that of Southern Railway Car No. 157851, from Natural Bridge, Ala., to Hamilton, Ohio. This shipment was delivered to the Northern Alabama Railway without routing instructions except "B. & O. delivery." There was then in effect a published joint through rate from Natural Bridge, Ala., to Hamilton, Ohio, of 34½ cents applying via Northern Alabama Railroad to Sheffield, Ala., thence Southern Railway to Chattanooga, Tenn., thence Cincinnati, New Orleans & Texas Pacific to Cincinnati, Ohio, thence Baltimore & Ohio to Hamilton, a total distance of 588.7 miles. There was another shorter route via which a combination rate of 33 cents applied, same being via Northern Alabama Railroad to Sheffield, Ala., thence Louisville & Nashville to Cincinnati, Ohio, thence Baltimore & Ohio to Hamilton, Ohio, a total distance of 509.1 miles. The Northern Alabama Railroad routed the shipment by the longer route, at [fol. 86] the higher rate and the Interstate Commerce Commission awarded reparation to the basis of the lower rate.

Wherefore, petitioners pray that they may respectively recover from the respectively designated defendants the

amounts set opposite their respective names in the tables set forth on pages 18 to 21, both inclusive, and pages 23 to 28, both inclusive, of their amended petition herein, said amounts aggregating the sum of $14,972.27, with interest on the said several amounts therein set forth, at the rate of 6% per annum, from the respective dates the transportation charges were collected, as specified in the order of the Interstate Commerce Commission, and that an order be issued commanding the said defendants to pay, on or before a date certain, said sums set opposite their respective names, together with interest as aforesaid, and that your petitioners be allowed a reasonable attorney's fee, to be fixed by the Court and taxed and collected against the several defendants herein, in such proportions as the several amounts of reparation, as aforesaid, awarded against them respectively, bears to the total amount of the judgment herein, as a part of the costs of this suit and as is authorized by the statute in such case made and provided, and for their costs and disbursements in this action, and such other relief as they may be entitled to.

Norman, Quirk & Graham, Attorneys for Petitioners.

[fol. 87] PLAINTIFFS' EXHIBIT "X" TO AMENDMENT TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 17224[1]

WAUSAU SOUTHERN LUMBER COMPANY

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

Submitted January 22, 1927. Decided May 8, 1928

On shipments of lumber and other forest products taking lumber rates, in carloads, from points east of the Missis-

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[1] This report embraces also No. 17068, W. P. Brown & Sons Lumber Company v. Alabama Great Southern Railroad Company et al.; No. 17298, Wausau Southern Lumber Company v. Alabama Great Southern Railroad Com-

sippi River and south of the Ohio and Potomac Rivers, and from points in Louisiana and Arkansas, to destinations on and east of the Mississippi River, principally in central territory, combination rates treated by the combination rule found applicable over certain routes although joint rates were in effect between same points over other routes. Shipments found to have been overcharged or misrouted. [fol. 88] Refund of overcharges and payment of damages for misrouting directed. Complaints dismissed.

G. F. Graham and Norman, Quirk & Graham for Wausau Southern Lumber Company, Southern Pine Association, and W. P. Brown & Sons Lumber Company; A. J. Ribe for American Lumber & Export Company and others; and B. M. Angell for Watters-Tonge Lumber Company and others.

A. A. Adams and G. F. Graham for Edward Hines Lumber Company and Edward Hines Yellow Pine Company; and D. G. Hitchcock for Southern Pine Association, interveners.

Chas. J. Rixey and H. L. Walker for Southern Railway system lines and Mobile & Ohio Railroad Company; E. A. Smith for Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company; J. G. Kerr, N. W. Proctor, and Edw. D. Mohr for Louisville & Nashville Rail-

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pany et al.; No. 17407, American Lumber & Export Company et al. v. Alabama & Vicksburg Railway Company et al.; No. 17858, Southern Pine Association v. Alabama & Vicksburg Railway Company et al.; No. 17957, Watters-Tonge Lumber Company et al. v. Alabama Great Southern Railroad Company et al.; No. 19522, South Bend Chamber of Commerce, for St. Joseph Valley Lumber Company v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 1), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 2), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 3), Same v. Atlantic Coast Line Railroad Company et al.; No. 19522 (Sub-No. 4), Same v. Louisville & Nashville Railroad Company et al.; No. 19522 (Sub-No. 5), Same v. Louisville & Nashville Railroad Company et al.; and No. 19522 (Sub-No. 6), Same v. Louisville & Nashville Railroad Company et al.

road Company; M. G. Roberts for St. Louis-San Francisco Railway Company; R. D. Hunter for Cleveland, Cincinnati, Chicago & St. Louis Railway Company; J. C. Rich and J. O. Gill for Gulf, Mobile & Northern Railroad Company; Marion B. Pierce and W. J. Kelly for Central Freight Association lines; and F. L. Speiden for certain southern carriers.

Report of the Commission

AITCHISON, Commissioner:

Exceptions were filed to the reports proposed by the examiner, and the cases were orally argued.

These complaints, filed on various dates from April 11, 1925, to January 21, 1926, are brought on behalf of numerous individuals, partnerships, and corporations, engaged in the manufacture and sale of lumber and other forest products. Collectively they bring in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac Rivers and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in central territory. Certain of the shipments are also alleged to have been misrouted. The periods covered by the complaints vary. One of them covers shipments as early as March 1, 1920. Three [fol. 89] of them specifically include shipments made during the pendency of this proceeding. Although there have been numerous informal complaints to stay the running of the statute of limitations, it is apparent that many of the claims on the early shipments are barred. The principal movement was during the years 1923, 1924, and 1925. At the hearing all allegations with respect to the reasonableness of the rates were withdrawn, except as to rates to destinations on the Chesapeake & Ohio, Maysville, Ky., to Kanawha City, W. Va., inclusive, and rates to Ironton, Ohio, on the Norfolk & Western. There is no prayer for future relief, as the measure of the rates here considered is under attack in other proceedings before us. The alleged misrouting is dependent on the question of tariff interpre-

tation, and that question therefore presents the principal issue for determination. Rates will be stated in cents per 100 pounds.

From the several points of origin to the several points of destination, there were joint or single-factor through rates, hereinafter collectively referred to as joint rates. There were also combination rates, subject to the so-called combination rule. The issues presented are whether the joint rates applied over all the routes, and, if not, whether the applicable rates over the routes over which the joint rates did not apply were the lowest full combinations of separately established factors by such routes, or the lowest rates resulting from the application of the combination rule to such factors.

Complainants' shipments may be divided into three classes: (1) Shipments specifically routed by complainants over routes over which joint rates did not apply, but over which the combination rates, as reduced by the combination rule, were lower; (2) shipments tendered to carriers unrouted, or with incomplete routes shown, which could have moved over routes over which combination rates, reduced by the combination rule, were lower than the joint rates applicable over other routes; and (3) shipments forwarded over initial carriers not participating in joint rates from points of origin to destinations, on which the straight combinations untreated by the combination rule were assessed. Defendants admit that the combination rule applied to the separately established rate factors applicable on this class of shipments.

Included in the above are certain shipments which were reconsigned in transit. Such shipments are through shipments and, under the tariffs here considered, were sub-[fol. 90] ject to the same transportation rates as were applicable on other through shipments.

Specific routings were shown in connection with the joint rates. In addition, some of the tariffs contained the following note:

The routing shown is that ordinarily and customarily used, and should be strictly observed by agents. If, from any cause, shipments are routed by carriers via other junction points but over the lines of carriers parties to this tariff, rates published herein will apply.

The above note is sometimes referred to as the "preferred-routing clause." Other of the joint-rate tariffs contained a similar clause reading as follows:

Routes shown herein are the routes ordinarily and customarily to be used and should be strictly observed by agents; but, if, for convenience of, or through error of, carriers parties to this tariff, shipments are sent via other junction points, but over lines of carriers parties to this tariff, rates named herein will apply.

In some of the joint-rate tariffs no similar rule appeared.

Defendants contend that the preferred-routing clause gave the carriers the privilege of using any route embracing the lines of carriers parties to the tariffs and applying the joint rates. For example, they contend that the legal rate from Laurel, Miss., to Columbus, Ohio, over the Gulf, Mobile & Northern to Ackerman, Miss., and the Illinois Central and its connections beyond was the joint rate of 43 cents. No joint rate was provided for specific application over this route, but the carriers embraced in this route were all parties to the joint-rate tariff, which carried the preferred-routing clause. Complainants claim a rate of 40.5 cents, which is the combination rate produced by the combination rule.

In cases dealing with the preferred-routing clause we have uniformly held that where a shipment moves in accordance with shipper's specific routing instructions, the shipper cannot claim the benefit of a lower-rated route under this clause. Dort Motor Car Co. v. Director General, 59 I. C. C. 374. In Page & Hill v. C., St. P. M. & O. Ry. Co., 52 I. C. C. 495, we said:

While the rule cited and relied upon by complainant covers deviations in routing "from any cause whatsoever" and is not in terms restricted to the carriers' initiative, its manifest purpose is, not to give shippers a choice of routes, but to protect the published joint rates whenever the car- [fol. 91] riers find it expedient or necessary to resort to other routes in order to move traffic.

In the instant case, the carriers are seeking to take advantage of the preferred-routing clause, and not the shippers. The record indicates that only one shipment not routed by the shipper moved over a route not specifically shown in the joint-rate tariffs. Movement at the specific direction of shippers cannot be considered as having been

made at the option of the carriers or "for convenience of, or through error of, carriers." The preferred-routing clause does not, therefore, cover shipments forwarded in pursuance of specific routing instructions from the shipper. It is an emergency carriers' convenience rule. Its effect is merely to enable the carriers, when for operating reasons they find it expedient or necessary, to move a routed shipment over other than the designated route or an unrouted shipment over other than the lowest-rated route, and to protect on such shipments the rates applicable over the routes over which the shipments should have moved. It does not relieve carriers of the obligation of protecting, on an unrouted shipment, the rate over the lowest-rated route available, nor does it deprive a shipper of his right, on a shipment routed by him, to the rate applicable over the route designated when that rate is lower than the rate in effect over the route used by the carriers. Defendants' position with respect to the preferred-routing clause is untenable.

The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. It reads in part as follows:

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking same rates, or arbitraries over Lumber Rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to [fol. 92] destination, or where used in connection with one or more class rate factors):

The formula which follows provides that the separately established commodity rate factors, except where they do not aggregate more than 30 cents, should be reduced by

amounts ranging from 0.5 cent for factors under 4 cents to 6 cents for factors 29 cents or over, and that 6 cents should be added to the sum of all factors. This rule has remained substantially the same since its first publication in February, 1919, except that the arbitraries and other amounts shown therein were increased on December 1, 1920, and reduced on July 1, 1922, to reflect the general increase and reduction.

The joint rates on lumber from and to the points here considered rarely exceeded the combination rates over other routes even when reduced by the use of the combination rule, until after the general increase of 1920. Owing to the variance in the percentage increases in rates authorized within and between the territorial groups, 25 per cent south of the Ohio River, 40 per cent north thereof, 35 per cent west of the Mississippi River, and 33⅓ per cent in the interterritorial joint rates, the formula did not produce exact results, but, as effective December 1, 1920, was designed to increase combination rates approximately 33⅓ per cent.

With minor exceptions, the instances where joint rates on lumber exceeded combination rates treated by the combination rule do not now exist, and have not existed since November 20 and 21, 1925, on which dates there became effective schedules suspended in Investigation and Suspension Docket No. 2449, the order of suspension in which was vacated after an informal conference. In some of these schedules, the routes to the Ohio River and joint-rate routes to points beyond were harmonized, and in others the routing limitations previously carried in connection with the joint rates were canceled, leaving such joint rates in effect over all routes.

Complainants' position is that the combination rule applied to shipments which moved, or which, without departing from routing instructions of the shipper, might have moved over routes over which there were no joint rates, notwithstanding the fact that joint rates were in effect over other routes between the same points of origin and destination. Defendants' position is that the combination rule did not apply where the initial carrier published a joint rate from point of origin to destination over any route.

[fol. 93] We have repeatedly held that, within reasonable limitations, ambiguities in a tariff must be resolved against the framer and in favor of the shipper. Brenner Lumber Co. v. Director General, 81 I. C. C. 241. In the instant case, defendants contend that the language of the combination rule is plain and unambiguous, and that the meaning which it conveys is exactly the meaning the carriers intended it to have, namely, that it applies "where no published through rates are in effect from point of origin to destination." They urge that the rule makes no reference to routes and therefore that the establishment of a joint rate over a single route precludes the application of the rule to the separately established factors applicable over other routes. They admit, however, that the "published through rate," namely, the joint rate, must apply over the line of the initial carrier of the route used, or designated by the shipper, in order to preclude the application of the rule to separately established factors. The interpretation contended for by complainants is no more inconsistent with a literal application of the rule than is that admitted by defendants to be proper.

The mills in the pine-producing section of the Mississippi Valley, south of the Alabama & Vicksburg, on and east of the Mississippi River, and on and west of the Mobile & Ohio, are in one group, and one rate applies to each destination in central territory. This grouping has existed for many years. Defendants urge that if the tariffs had been applied as complainants contend, the rates applicable on the shipments from points in this group would have varied preferentially and prejudicially as prohibited by the act. They also point out that the application of the combination rule in accordance with complainants' contentions would have resulted in a number of violations of the long-and-short-haul clause of section 4. For example, the combination rate of 40.5 cents claimed by complainants on shipments from Laurel to Columbus over the Gulf, Mobile & Northern by Ackerman and the Illinois Central and its connections is lower than the rate of 41.5 cents which applied from Ackerman to Columbus. A joint rate of 43 cents applied from Laurel and the entire group described above to Columbus, over the Gulf, Mobile & Northern via Jackson, Tenn., and the Illinois Central and its connections, did not apply through Ackerman and the Illinois Central. The lat-

ter route would short haul the Gulf, Mobile & Northern and is more circuitous than the route through Jackson.

[fol. 94] We have uniformly held, in cases where tariff situations similar to those here considered were presented, that the combination rule is applicable in the absence of a joint rate over the route traversed regardless of the fact that joint rates were applicable over other routes. Cancellation Rule for Combination Rates, 93 I. C. C. 614; M'Gowin-Foshee Lumber Co. v. A. F. & G. Ry. Co., 95 I. C. C. 451; Moore-Marshall Lumber Co. v. N. O. & N. E. R. R. Co., 112 I. C. C. 33; Gunther & Co. v. L. & N. R. R. Co., 112 I. C. C. 387 The arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holdings on this question.

With reference to unrouted shipments, defendants rely upon Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 482, in which the Supreme Court said:

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interest and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only "if other conditions are reasonably equal." Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice.

It should be noted that the Supreme Court held that the reasonableness of the use by a carrier of a more expensive route is an administrative question for this commission to determine. The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. We do not consider that the particular circumstances of these cases justified

the use of the routes over which the higher rates were applicable.

Complainants in Dockets Nos. 17407 and 17957 contend that the Cincinnati, Ohio, rates applied from Covington, [fol. 95] Ky., to points on the Chesapeake & Ohio, Mayville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, under an intermediate rule, and in the latter docket complainants also contend that the applicable rates to these destinations, either joint or combination, were unreasonable to the extent that they exceeded the Covington combination treated by the combination rule, using as the factors from Covington the rates from Cincinnati as maxima. The pertinent portion of the intermediate rule relied upon by these complainants reads as follows:

From any point of origin not shown herein on the rails of the initial carrier the rates from the next more distant point shown herein will apply.

Cincinnati is shown as a point of origin in the tariff, while Covington is not so shown. Covington is directly intermediate between Cincinnati and the destinations named above. We find that the Cincinnati rates applied from Covington to destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western. The applicable rates on shipments to such destinations are those determined in accordance with our general conclusions elsewhere stated. There is no evidence to show that they were unreasonable.

We find that the applicable rates were those over the routes of movement, namely, over routes where the joint rates applied, the joint rates; and over routes where the joint rates were not applicable, the lowest rates resulting from the application of the combination rule to the factors applicable to the through transportation; and that where the charges collected were in excess of such applicable rates the shipments were overcharged.

We further find that those shipments which were delivered by complainants to defendants with complete routing instructions to send such shipments over routes over which the joint rates did not apply, and which were forwarded over routes other than those designated, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over the routes designated.

We further find that those shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which were forwarded over routes over which higher rates applied than would have applied had the shipments been forwarded over the lowest-rated routes, or the lowest-rated routes consistent with complainants' routing instruc-
[fol. 96] tions, as the case may be, were misrouted, and that the complainants were damaged thereby to the extent that the charges collected were in excess of those applicable over such lowest-rated available routes.

We further find that the rates legally applicable to the destinations on the Chesapeake & Ohio, Maysville to Kanawha City, inclusive, and to Ironton on the Norfolk & Western, embraced in No. 17957, are not shown to have been unreasonable.

The overcharges should be promptly refunded and the defendants responsible for the misrouting should pay to complainants the damages resulting therefrom. The complaints will be dismissed.

WOODLOCK, Commissioner, concurring:

I think it desirable to explain the reason why I concur in a decision of which some, at least, of the results are grossly inequitable. The facts of the case are recited in the report. Plainly stated they amount to this:

Prior to 1918 when General Order No. 28 was issued there were joint through rates from the lumber group, here concerned, to central territory applying over many routes. There were other routes between the same points over which joint through rates did not apply and the combinations over these routes were, in the great majority of cases, higher than the joint through rates. Following General Order No. 28 the so-called "combination rule" was published as a convenient method of preventing a double increase being reflected in through rates made on these combinations, while at the same time preserving the general relation of these rates to the joint through rates applying between the same points. This relation was, apparently, preserved until the general rate changes in 1920 and 1922. The effect of those changes was to dislocate it, as described in the report, leaving very many of the combinations, when treated by the rule, at a level below that of the joint through

rates between the same points. This manifestly improper relation was not corrected until November, 1925. Meanwhile complainants in some of these cases took the opportunity offered by the tariff situation to route their shipments over routes not covered by the joint through rates, and, later, claim these "treated" combinations as the applicable rates, and the instant report sustains their claims. Other complainants whose shipments were tendered to carriers, unrouted, made similar claims which are also sustained. Unfair as is this result, there appears to be no [fol. 97] way under the law to preclude it. I believe it to be our clear duty to make no decision, the consequence of which is clearly inequitable unless the law absolutely compels us thereto. In this case such compulsion appears to be present. There is no real ambiguity in the tariffs (notwithstanding reference thereto in the report) and the tariffs have the effect of law. We have no option in the matter. For that reason I am compelled to accept this report.

I take this opportunity, however, to say that it is high time that this emergency rule of tariff making be excised from carrier tariffs. Whatever reason existed for it in the years immediately following its invention has long since disappeared. Of late years it has proved a fruitful source of litigation in this forum, and has, in many cases, led to results as inequitable as those in the present case. Moreover, and this is at least equally important, it has led us to take the position, in the so-called Sligo Case, of saying, in effect, that one carrier can make a rate applicable over the line of another carrier without that other carrier's concurrence. I believe this to be wrong in principle. What a carrier may be said to "hold out" is one thing, and a legally applicable rate is another. It is with the latter that we are concerned. The former is the business of the courts of justice. By our awards of reparation in the cases following the "Sligo rule" we have usurped their function and it is regrettable that they have not up to this time been given an opportunity to pass upon the question.

BRAINERD, Commissioner, concurring in part:

Owing to the peculiar circumstances of these cases, I am of the opinion that the defendant carriers ought not to be found guilty of misrouting shipments that were delivered to them by the complainants unrouted, and which were trans-

ported by the defendants over the routes ordinarily and customarily used as specified in the through lumber tariffs containing the schedules of joint rates. There were numerous such routes. As said by the majority, it is ordinarily the duty of the carrier to transport by the cheaper route, but that duty is not an absolute one. There is no finding that on the shipments that moved over the lines taking the combination rates, through bills of lading showing such routing were issued, or that such shipments were transported on through billing, or that the total freight charges were collected as one item either by the delivering or the initial car- [fol. 98] rier, or that the carrier's agent responsible for any misrouting here found had notice or knowledge, actual or imputed, of the alternative route over which the combination rates applied, or that it was "The cheapest reasonable route known to him." Conf. Ruling 214 (c) (g). It is not found that these lines make a through route in fact either by express agreement or by course of business. See Through Routes and Joint Rates, 12 I. C. C. 163.

Relief is granted, as I understand the matter, upon the ground that the act of the carriers in transporting the shipments in question over the usual and customarily used routes and assessing the joint rate rather than transporting them over the routes taking the combination rates was, under the facts in this case, an unjust and unreasonable "practice" (denominated here misrouting) prohibited by paragraph (6) of section 1 of the act; that said practice resulted in an "unjust and unreasonable charge for such service" declared unlawful under paragraph (5) of section 1; and that the measure of damages sustained in consequence of such violation of the provisions of the act is prima facie the difference between the rates applicable over those routes, respectively. There is no other proof of actual damage; no showing of the intrinsic unreasonableness of either rate; none has been required by us in cases of this nature.

Here the rates charged were the only legal rates chargeable for the actual transportation service performed and are conceded to be reasonable. Under the peculiar circumstances thus presented, it seems to me that defendants have fully justified their conduct and that none of them can properly be charged with a breach of duty founded upon the obligation of the carriers to deal justly with their ship-

pers. Conversely, it is the shippers' duty to deal justly with the carriers. I, therefore, dissent from so much of the majority's report as finds that those shipments which were delivered by complainants to defendants without routing instructions, or with incomplete routing instructions, and which moved over the customarily used routes were misrouted, and that complainants were damaged thereby.

TAYLOR, Commissioner, dissenting:

The question involved in this proceeding is very simple. It is whether the combination rule which specifically provides that it only applies "where no published through [fol. 99] rates are in effect from point of origin to point of destination," can be used between a point of origin and a point of destination where a through joint rate does exist.

When General Order No. 28 became effective, a special supplement dated June 25, 1918, was issued to tariffs covering joint rates on lumber from the yellow-pine territory of the South to points of destination mainly located north of the Ohio River. This supplement added a fixed increase to each joint point-to-point rate existing at the time these increases became effective. A similar supplement was issued to make effective the increases authorized by Ex parte 74 in all joint point-to-point rates, on the same commodity, existing at that time.

The fact that joint rates did not at the time exist between all points of origin and all points of destination made necessary the creation of the combination rules, amended from time to time, to bridge this hiatus. This formula reads as follows:

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking same rates, or arbitraries over Lumber Rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):

Language could not be plainer in its attempt to say that this rule was to be used only where no published through

rate was in effect from point of origin to destination. If any additional light was necessary upon this subject, it came from the words of Walter J. Kelly, the traffic expert who participated in the conferences which led to the creation of this formula, who testified under oath as follows:

To me that clause is very clear and precludes the application of this tariff in any instance where there is a through rate from point of origin to destination, on the commodity in question. There is no doubt about that in my mind at all, and from my participation in the conferences which led up to this tariff, I know that is what was intended.

The majority have approved the use of this formula in direct and positive contradiction to its terms, for the pur- [fol. 100] pose of creating rates from points of origin to points of destination where through rates exist, the result of which is to destroy the through one-figure rates in effect at the time. Such a decision as this, carried to its inevitable conclusion, would be followed by a train of deplorable results. Discriminations between individuals and localities would be created, the destruction of a nice adjustment of rates would be accomplished, and long-established groups of origin of the important commodity of lumber, moving in great volume from the long-leaf pine sections of the South, to many consuming points of destination beyond the Ohio River, would be broken up.

For these reasons I dissent from the conclusions of the majority.

Commissioner Porter did not participate in the disposition of these cases.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER—Filed February 16, 1934

Come now the defendants, Alabama and North Western Railroad Company, et al., and by leave of court first had and obtained, amend the answer heretofore filed by them in this proceeding, by the insertion immediately following the last paragraph of Paragraph III of the said answer of the following:

Defendants further state that the rate situation that was before the Interstate Commerce Commission in the said

case known as Wausau Southern Lumber Company vs. A. G. S. R. R. Co., et al., 142 I. C. C. 521, I. C. C. Docket No. 17224 and related cases, and the issues that have arisen out of that rate situation, can best be understood by taking the rate on lumber from a typical shipping point in Southern Territory to a typical consuming point in Northern Territory—a rate that is representative of the rate situa-
[fol. 101] tion—showing what that rate was, the routes over which it applied under the provisions of the applicable tariff, the tariff rules and regulations affecting or applying to the said rate, the tariff rules and regulations upon which the complainants rely, and all other facts which are material to the proper consideration and determination of the problem of tariff construction that was before the Interstate Commerce Commission in the said Wausau Southern Lumber Company case and related cases, and is now before this Honorable Court in this proceeding.

A typical lumber shipping point in Southern Territory is Laurel, Mississippi, and a typical consuming point in Northern Territory is Columbus, Ohio. The joint through rate on lumber that was in effect from Laurel, Mississippi to Columbus, Ohio, during the period within which the shipments moved on which reparation is here claimed was 43 cents per hundred pounds. This joint through rate of 43 cents is contained in Speiden's Freight Tariff 57-F, I. C. C. No. 866. This tariff is described on its title page as

"Mississippi Valley—Middle States Lumber Tariff.

From

Points in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee,

To

Points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Ontario, Pennsylvania, West Virginia, and Wisconsin."

Laurel, Mississippi is located on three roads: the Gulf, Mobile & Northern, the Gulf & Ship Island and the New Orleans & North Eastern. The joint through rate of 43 cents from Laurel, Mississippi to Columbus, Ohio, applied from Laurel by each one of these carriers as an initial or originating carrier; the routes over which this through rate

of 43 cents applied were specifically designated in the tariff, the name of each railroad making up the through route from Laurel to Columbus being shown. The tariff named 62 specific routes from Laurel to Columbus in connection with the Gulf & Ship Island as an originating carrier, 56 in connection with the Gulf, Mobile & Northern as an originating carrier, and 32 in connection with the New Orleans & North Eastern as an originating carrier, a total of 150 [fol. 102] different routes from Laurel to Columbus over which the joint through rate of 43 cents applied.

In addition to the routes thus specifically provided for in the tariff for the movement of lumber from Laurel, Mississippi to Columbus, Ohio, under the rate of 43 cents, there were a great many other routes made up of sections or parts of the railroads operating between Laurel and Columbus, over which this rate of 43 cents in question did not apply under the routing provisions in the tariff, the rate of 43 cents named in the tariff being restricted to apply only over the routes specifically designated therein. The rates applicable to the shipments that moved over the routes other than those specifically designated in the tariffs would be rates made up of the combination of local rates applying to such shipments. These combination rates were in every case made up of the rate from Laurel, Mississippi to Cincinnati, Ohio, plus the rate from Cincinnati, Ohio to Columbus, Ohio.

A typical route from Laurel, Mississippi to Columbus, Ohio, in connection with the Gulf, Mobile & Northern Railroad as an originating carrier, over which route the joint through rate of 43 cents applied, consisted of the railroad of the Gulf, Mobile & Northern from Laurel to Jackson, Tennessee, the railroad of the Illinois Central Railroad Company from Jackson to Louisville, Kentucky, and connections beyond Louisville.

A typical route from Laurel, Mississippi to Columbus, Ohio, in connection with the Gulf, Mobile & Northern Railroad as an originating carrier, over which route the joint through rate of 43 cents was not, under the provisions of the tariff, lawfully applicable, consisted of the railroad of the Gulf, Mobile & Northern from Laurel to Ackerman, Mississippi, the railroad of the Illinois Central Railroad Company from Ackerman to Louisville, Kentucky, and thence by connections beyond Louisville. As the joint

through rate of 43 cents did not apply via the route just described, the rate lawfully applicable to such a shipment as might move over that route would be the rate made up of the combination on the Ohio River. The rate via this route applying from Laurel, Mississippi to Cincinnati, Ohio, was 29½ cents per hundred pounds, and from Cincinnati to Columbus, Ohio, was 14 cents, a total 43½ cents or ½ cent greater than the joint through rate of 43 cents applying via the route specifically designated in the tariff. It will be later pointed out that if this combina- [fol. 103] tion rate of 43½ cents is treated by the so-called "combination rule," to which reference will later be made, the rate would be 40½ cents.

The question presented by this case is whether, in the case of shipments of lumber from Laurel, Mississippi to Columbus, Ohio, which were specifically routed by the shipper by the Gulf, Mobile & Northern Railroad as an originating carrier to Ackerman, Mississippi, thence by the Illinois Central Railroad to Louisville, Kentucky, and connections beyond, the rate lawfully applicable was the combination rate of 43½ cents, made up of the local rate of 29½ cents, applying over that route from Laurel to Cincinnati, Ohio, and the rate of 14 cents applying from Cincinnati to Columbus, Ohio, or that combination rate when treated by the so-called "combination rule," which would result in a rate of 40½ cents. The published through rate of 43 cents applying from Laurel, Mississippi to Columbus, Ohio, did not apply over the route of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, and thence over the route of the Illinois Central Railroad from Ackerman to Louisville and northern connections beyond. It is the contention of the plaintiffs in this proceeding that the rate lawfully applicable to shipments moving from Laurel to Columbus over the said routes made up of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, thence the Illinois Central Railroad to Louisville and northern connections beyond, was the combination of the local rate treated by the so-called "combination rule."

The shipments on which reparation is sought in this proceeding were either routed specifically by the shipper over routes over which the joint through rate did not apply under the provisions of the tariff, that is to say, in the case of the shipments made from Laurel, Mississippi to Colum-

bus, Ohio, the shipments were specifically routed by the shipper over the Gulf, Mobile & Northern Railroad as an originating carrier from Laurel, Mississippi to Ackerman, Mississippi, by the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence by northern connections beyond, or were tendered to the originating carrier without any routing instructions, in which latter case the plaintiffs contend that the carriers were obligated to forward the shipments not over the routes over which the joint through rates applied as provided for in the tariff, but over routes for the transportation of lumber over which routes the combination basis was applicable.

[fol. 104] The tariff naming the joint through rate on lumber from Laurel, Mississippi to Columbus, Ohio (Speiden's Freight Tariff 57-F, I. C. C. No. 866), which joint through rate was restricted to apply over the routes specifically designated in the tariff, provided by Rule 318, the title of which rule is "Rules for Constructing Combination Rates," that—

"Except as otherwise indicated, rates published in tariffs and supplements thereto are subject to rules for constructing combination rates as provided in B. T. Jones' Tariff 228, I. C. C. U. S. 1, supplements thereto or reissues thereof."

The title page of B. T. Jones' Tariff 228, I. C. C. U. S. 1, contains this description of the tariff:

"Rules for Constructing Combination Rates on Commodities Enumerated in Tariffs as Amended (for continuous rail shipment)."

Section 4 of B. T. Jones' Tariff 228, I. C. C. U. S. 1, reads as follows:

"Section No. 4.

Reissue. Effective July 1, 1922, in Supp. No. 13

Substitute the following for Section 4, of tariff, as amended:

Lumber and Forest Productions, Carloads

Where no published through rates are in effect from point of origin to destination on Lumber and articles taking

same rates, or arbitraries over Lumber rates, also other Forest Products, on which rates are not higher than on Lumber, carloads, and two or more commodity rate factors (see Note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):

1. Where combination of separately established commodity rate factors is 30 cents per hundred pounds or less, such combination will apply.

[fol. 105] 2. Where combination of separately established commodity rate factors is over 30 cents per hundred pounds, the through rate will be made by adding 6 cents per hundred pounds, also the full class rate factor or factors without deduction, to the sum of the commodity rate factors for basing the through rates arrived at in the following manner.

(a) Where a separately established commodity rate factor is 30 cents per hundred pounds, or less, the factor for basing the through rate will be as shown in table of rates in Section 5.

(b) Where a separately established commodity rate factor is over 30 cents per hundred pounds the factor for basing through rate will be 6 cents per hundred pounds less.

NOTE.—Where the rates on commodities specified in Section 4, of tariff, are published as lettered Classes other than A, B, C, and D, in the Southern, Alabama, Florida, Georgia, Mississippi or Virginia Classifications or exceptions thereto, such factors will be considered commodity rates."

Section 5 of the aforesaid tariff provides that where the separately established commodity rate factor is 29½ cents, the factor for basing the through rate will be 23½ cents, and that where the separately established commodity factor is 14 cents, the factor for basing the through rate will be 11 cents.

Thus under the aforesaid rule for constructing combination rates where no published through rates are in effect from the point of origin to destination on lumber, the rate

from Laurel, Mississippi to Columbus, Ohio, that would apply via the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, thence by the line of the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence by northern connections beyond, if under the applicable tariffs the said rule for constructing combination rates may be lawfully applied, would be arrived at by adding together the basing factors of 23½ cents and 11 cents, or 34½ cents, and by adding to the sum of the commodity rate factors thus arrived at 6 cents, which gives a combination rate arrived at by the use of the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, of 40½ cents.

The rate of 40½ cents from Laurel, Mississippi, to Columbus, Ohio, thus arrived at by the use of the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. [fol. 106] 1, is the rate that the plaintiffs contend lawfully applied to the shipment of lumber made from Laurel to Columbus and routed by the shippers via the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and northern connections beyond. The plaintiffs also contend that in the case of any shipments delivered to the Gulf, Mobile & Northern Railroad at Laurel, Mississippi, without routing instructions, it was the duty of the carriers to forward the shipments over the route just described. the rate over which route, when arrived at by the use of the said combination rule, provided such rule may lawfully be used in view of the provisions of the applicable tariff in the construction of combination rates via that route, would be 40½ cents as compared with the joint through rate of 43 cents provided for in the published tariffs for the movement of lumber from Laurel to Columbus via the routes designated in the tariffs.

The joint through rate on lumber in effect at the time the shipments moved on which reparation is sought in this proceeding from Ackerman, Mississippi to Columbus, Ohio, Ackerman being an intermediate point between Laurel, Mississippi and Columbus, Ohio, was 41½ cents. The joint through rate applying to Columbus, Ohio from Laurel, Mississippi, a more distant point than Ackerman, Mississippi, was, as stated, 43 cents. There was, therefore, under this adjustment of rates no violation of Section 4 of the Interstate Commerce Act which provides that it shall

be unlawful for any common carrier subject to the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

If the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, may lawfully be used in constructing rates on lumber from Laurel, Mississippi to Columbus, Ohio, applying over the route of the Gulf, Mobile & Northern Railroad from Laurel to Ackerman, Mississippi, thence the Illinois Central Railroad from Ackerman to Louisville, Kentucky, and thence northern connections beyond, the rate from Laurel via this route would, as stated, be 40½ cents, whereas the rate from Ackerman, Mississippi, an [fol. 107] intermediate point, over the same line or route was 41½ cents, thus bringing about a violation of Section 4 of the Interstate Commerce Act.

Another example of how a violation of Section 4 of the Interstate Commerce Act is brought about if the combination rule under the applicable tariff may be lawfully applied to the construction of the combination rate over routes not authorized in the tariff naming the joint through rates on lumber, is illustrated by the rate from Laurel, Mississippi to Dayton, Ohio. The joint through rate on lumber from Laurel to Dayton, applying over the route specifically designated in the tariff, is 38 cents. This rate applies, for example, over the Gulf & Ship Island Railroad from Laurel to Jackson, Mississippi, thence over the Illinois Central Railroad to Louisville, Kentucky, and northern connections beyond. This joint through rate of 38 cents does not apply from Laurel to Dayton by way of the Gulf & Ship Island Railroad to Jackson, Mississippi, the Alabama & Vicksburg Railway from Jackson, Mississippi to Meridian, Mississippi, and connections beyond. If the combination rule contained in B. T. Jones' Tariff 228, I. C. C. U. S. 1, may lawfully be applied in constructing combination rates applying over the route just described, the rate would be 36½ cents from Laurel, Mississippi to Dayton, Ohio. But the joint through rate applying on lumber from Jackson, Mississippi, a point directly intermediate between Laurel, Mississippi and Dayton, Ohio, via the route last described, was 38 cents, or 1½ cents higher than the rate from the more distant point.

Wherefore, having fully answered, these defendants pray as in their answer heretofore filed.

Edward P. Humphrey, Marvin H. Taylor, A. M. Warren, Trabue, Doolan, Helm & Helm, Attorneys for Defendants, Alabama & North Western Railroad Co., The Alabama & Vicksburg Railway Co., The Alabama Great Southern Railroad Co., Alabama, Tennessee & Northern Railroad Co., Atlanta & West Point Rail Road Co., Atlanta & Saint Andrews Bay Railway Co., Atlantic Coast Line Railroad Co., Birmingham & Southeastern Railroad Co., Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Co. and Louisville & Nashville Railroad Co., Lessees), Chatta- [fol. 108] hoochee Valley Railway Company, Chicago Great Western Railroad Co., The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Co., DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Co., The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Co., Illinois Central Raiload Company, Kosciusko & Southeastern Railroad Co., Lehigh Valley Railroad Company, Louisville & Nashville Railroad Co., Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Co., New Orleans Great Northern Railroad Co., Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Co., The Yazoo and Mississippi Valley Railroad Company.

[fol. 109] IN UNITED STATES DISTRICT COURT

DEMURRER TO PETITION AS AMENDED—Filed June 11, 1934

Come the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Rail Road Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, (Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad Company, and each and all of them demur to the plaintiffs' petition herein as amended, because it does not state facts sufficient to constitute a cause of action against any of said defendants.

E. A. Smith, Horace Walker, E. P. Humphrey, Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Counsel for Above Mentioned Defendants.

[fol. 110] IN UNITED STATES DISTRICT COURT

DEMURRER TO ANSWER AND ANSWER AS AMENDED, OF CERTAIN DEFENDANTS—Filed June 11, 1934

Come the plaintiffs herein and each and all of them demur to Paragraph II, Paragraph III and Paragraph IV, and to each of said paragraphs, of the answer and to the amended answer, filed herein by the defendants, Alabama and North Western Railroad Company, The Alabama and Vicksburg Railway Company, The Alabama Great Southern Railroad Company, Alabama, Tennessee & Northern Railroad Corporation, Atlanta and West Point Railroad Company, Atlanta & Saint Andrews Bay Railway Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessee), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Southern and Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville and Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and The Yazoo and Mississippi Valley Railroad

Company, because said paragraphs, or either of them, and the amended answer, do not state facts sufficient to constitute a defense herein.

Norman, Quirk & Graham, Attorneys for Plaintiffs.

[fol. 111] IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed June 22, 1934

I do not think the plaintiffs are entitled to the relief sought.

The case presents the single question of the proper construction of a rate tariff. This is a question of law, and while in such a case the decision of the Interstate Commerce Commission should be received with respect, and given that weight to which the experience of its membership in this field justly entitles it, such decision is not binding or controlling upon the Courts.

At the time of the shipments involved in this complaint there was in existence between the points of origin and destination of all such shipments lawfully published through rates on lumber and articles taking lumber rates, and the routes over which these through rates apply are not under attack as being unreasonable or impracticable. The contention of the plaintiffs is that by applying the so-called Combination Rule to combination rates existing over routes from points of origin to destination different from the route covered by the through rate, they could have secured a cheaper rate, and that as to those shipments thus routed by the shipper, they should have had the benefit of this cheaper rate; and where routing directions were not given by the shipper, it was the duty of the carrier to route the shipments over such combination rate route and apply to such combination rate the Combination Rule, thus giving the shipper a cheaper rate than the through rate referred to.

That part of the so-called Combination Rule requiring construction in this case reads as follows:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other

forest products, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors (see note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner:"

Then follows the formula for determining such combination through rate.

The quoted language seems to me clear and unambiguous, and as a legally established rate tariff has the force and effect of a statute, it should be construed in the same man- [fol. 112] ner as statutes are construed. Applying that rule of construction, there being no ambiguity in the wording of the tariff, it should be construed as written. The so-called Combination Rule, according to the plain wording of the language quoted, has no application except in those cases where there is no published through rate in effect from point of origin to destination. The record abundantly shows in this case that there was such published through rate in effect at the time of each of the shipments involved in this action. Therefore, it seems to me that there did not exist any occasion for the application of the Combination Rule as is insisted upon by the plaintiffs. As the tariff is plain and unambiguous, and is susceptible of only one meaning when the language thereof is given its ordinary and usually accepted meaning, there arises no occasion for the application of those aids to construction of statutes and rate tariffs resorted to by courts in those cases where the language is ambiguous or susceptible of more than one meaning.

It follows, therefore, that I am of the opinion that the Interstate Commerce Commission's reparation order, upon which this action is based, was founded upon an incorrect interpretation of the tariff under consideration; and further, of course, that the plaintiffs are not entitled to recover in this action such reparation awards.

As I recall, this action was submitted on the demurrer of the defendants to the plaintiffs' petition and amended petition, and on the demurrer of the plaintiffs to Paragraph II, III and IV of the answer; and counsel for the defendants will prepare order on said demurrers in accordance with the views here expressed and having submitted same to counsel for the plaintiffs, will tender same for entry, unless counsel for the parties prefer to treat the case as

having been submitted finally, in which event order will be prepared accordingly.

Charles I. Dawson, Judge.

[fol. 113] In United States District Court

Order Sustaining Demurrer and Dismissing Petition—Entered July 11, 1934

This action having been submitted on the defendants' demurrer to the petition as amended, and on the plaintiffs' demurrer to Paragraphs II, III and IV of the answer as amended, and the Court being advised,

It is now ordered that the demurrer to the petition as amended be, and it is, sustained, to which the plaintiffs, by counsel, except, and the demurrer to Paragraphs II, III and IV of the answer as amended, is overruled, to which plaintiffs, by counsel, except.

Whereupon came plaintiffs, by counsel, and declined to plead further, and it is now ordered that the petition herein, as amended, be and the same is hereby dismissed.

Entered this 11th day of July, 1934.

Chas. I. Dawson, Judge.

In United States District Court

Petition for Appeal—Filed Oct. 6, 1934

To the Hon. Charles I. Dawson, District Judge:

The plaintiffs herein, feeling aggrieved by the decree rendered and entered in the above-styled case on the 11th day of July, A. D., 1934, do hereby appeal from said decree to the Circuit Court of Appeals for the 6th Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed, citation or notice thereof having been waived by the defendants herein, which Waiver of Citation is filed herewith, and further pray that a transcript of the record, proceedings and documents, upon which said decree was based, duly

authenticated, be sent to the United States Court of Appeals for the 6th Circuit, under the rules of such court in such cases made and provided.

[fol. 114] And your petitioners further pray that the proper order relating to the required security to be required of them be made.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs.

Have seen and copy received:

Trabue, Doolan, Helm & Helm, Marvin H. Taylor, Edw. P. Humphrey, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 6, 1934

The plaintiffs herein having tendered a petition for appeal and assignment of errors, on motion of J. V. Norman, Esq., attorneys for plaintiffs, it is hereby ordered that same be filed and that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulation, and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Sixth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of $300.00.

This the 6th day of October, 1934.

Chas. I. Dawson, U. S. District Judge, Western District of Kentucky.

[fol. 115] Bond on appeal for $300.00, approved October 6, 1934, omitted in printing.

[fol. 116] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 6, 1934

Now come the plaintiffs, in the above entitled cause, and file the following Assignment of Errors, upon which they

will rely in their prosecution of the appeal in the above entitled cause, from the decree, made by this Honorable Court on the 11th day of July, 1934; and for such assignment of errors say:

I

That the United States Court for the Western District of Kentucky erred in sustaining the demurrer, filed by the defendants herein, to the petition as amended.

II

That the Court erred in overruling the demurrer, filed by the plaintiffs, to Paragraphs II, III and IV of the answer as amended.

III

The Court erred in ordering the petition herein, as amended, to be dismissed and in dismissing same.

IV

The Court erred in holding that the Interstate Commerce Commission's reparation order, upon which this action is based, was founded upon an incorrect interpretation of the tariff under consideration; and that the plaintiffs are not entitled to recover in this action such reparation awards.

V

The Court erred in holding that the Combination Rule, contained in the tariff under consideration, requiring construction in this case, and reading as follows:

"Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other forest products, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors (see note) are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner."

[fol. 117] "has no application except in those cases where there is no published through rate in effect from point of origin to destination;" and in holding that "the record

abundantly shows in this case that there was such published through rate in effect at the time of each of the shipments involved in this action."

VI

The Court erred in failing to overrule the demurrer, filed by the defendants herein, to the petition as amended.

VII

The Court erred in failing to sustain a demurrer, filed by the plaintiffs herein, to paragraphs II, III and IV of the answer, as amended.

VIII

The Court erred in failing to find that the reparation order of the Interstate Commerce Commission, upon which this action is based, was founded upon the correct interpretation of the tariff under consideration; and in failing to find that the plaintiffs are entitled to recover in this action such reparation awards.

IX

The Court erred in failing to find that the Combination Rule, contained in the tariff under consideration, quoted above in Exception No. V, applied to the shipments involved in this action; and in failing to find that said tariff and Combination Rule, properly construed, means that the said Combination Rule applied, as to the shipments in question, where there was no published through rate over the route the shipments moved, or, in the absence of routing instructions, route over which they should have moved.

Wherefore, the appellants pray that said decree be reversed and that said District Court for the Western District of Kentucky be ordered to enter a decree reversing the decision of the lower Court in said cause.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Appellants.

Have seen and copy accepted:

Edw. P. Humphrey, Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Attorneys for Defendants.

[fol. 118] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD—Filed October 6, 1934

Come the parties hereto, by counsel, and stipulate that the transcript of record on appeal herein, may and shall consist of the following documents:

1. The original petition and Exhibit "C," filed therewith. (It is stipulated that Exhibits "A" and "B," lists of names and addresses of plaintiffs and defendants, filed with the original petition shall not be included in the transcript of record on appeal.)
2. The original answer filed by defendants to the original petition.
3. The amended petition and Exhibit "X," filed therewith by plaintiffs.
4. Amendment to the answer filed by the defendants.
5. Demurrer of the defendants to the petition as amended.
6. Demurrer of the plaintiffs to paragraphs 2, 3 and 4 of the answer as amended.
7. Opinion.
8. Order or decree of the Court, entered therein on July 11, 1934, sustaining the demurrer to the petition as amended, and overruling the demurrer to paragraphs 2, 3 and 4 of the answer as amended, and dismissing the petition as amended.
9. Plaintiffs' petition for appeal.
10. Order allowing appeal.
11. Waiver of citation or notice of appeal.
12. Plaintiffs' assignment of errors.
13. Stipulation as to contents of transcript of record on appeal.

J. V. Norman, Norman, Quirk & Graham, Attorneys for Plaintiffs. Trabue, Doolan, Helm & Helm, Edw. P. Humphrey & Marvin H. Taylor, Attorneys for Defendants, Alabama & North Western Railroad Co., The Alabama & Vicksburg Railway Co., The Alabama Great Southern Railroad Co., Alabama, Tennessee & Northern RR. Co., Alabama & West Point Rail Road Co., Atlanta & Saint Andrews Bay Railroad Co., Atlantic Coast Line Rail-

road Co., Birmingham & Southeastern Railroad [fol. 119] Co., Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Co. and Louisville & Nashville Railroad Co., Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Co., The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Co., DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern & Florida Railway Co., The Greene County Railroad Company, Gulf and Ship Island Railroad Co., Gulf, Mobile and Northern Railroad Co., Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Co., Lehigh Valley Railroad Company, Louisville & Nashville Railroad Co., Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Co., New Orleans Great Northern Railroad Co., Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Co., The Yazoo and Mississippi Valley Railroad Co.

[fol. 120] IN UNITED STATES DISTRICT COURT

WAIVER OF CITATION OR NOTICE OF APPEAL—Filed October 6, 1934

Come the defendants, Alabama & North Western Railroad Company, The Alabama & Vicksburg Railway Company, The Alabama Great Southern Railroad Company,

Alabama, Tennessee & Northern Railroad Company, Atlanta & West Point Rail Road Company, Atlanta & Saint Andrews Bay Railroad Company, Atlantic Coast Line Railroad Company, Birmingham & Southeastern Railroad Company, Carolina, Clinchfield & Ohio Railway (Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessees), Chattahoochee Valley Railway Company, Chicago Great Western Railroad Company, The Chicago, Rock Island and Pacific Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Columbus and Greenville Railway Company, DeKalb & Western Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Georgia Railroad, Georgia Southern & Florida Railway Company, The Greene County Railroad Company, Gulf and Ship Island Railroad Company, Gulf, Mobile and Northern Railroad Company, Illinois Central Railroad Company, Kosciusko & Southeastern Railroad Company, Lehigh Valley Railroad Company, Louisville & Nashville Railroad Company, Mississippian Railway, Mississippi Central Railroad Company, Mississippi Eastern Railway Company, Missouri Pacific Railroad Company, The Nashville, Chattanooga & St. Louis Railway, New Orleans and Northeastern Railroad Company, New Orleans Great Northern Railroad Company, Northern Alabama Railway Company, Pearl River Valley Railroad Company, Southern Railway Company, The South Georgia Railway Company, Tennessee, Alabama and Georgia Railway, Tennessee Central Railway Company, The Tuskegee Railroad Company, The Western Railway of Alabama, Winston-Salem Southbound Railway Company, and the Yazoo and Mississippi Valley Railroad Company, by counsel, and hereby waive the service of citation or notice of appeal allowed herein.

Edw. P. Humphrey & Marvin H. Taylor, Trabue, Doolan, Helm & Helm, Attorneys for Defendants and Appellees Named Supra.

[fols. 121 & 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY

Cause Argued and Submitted, February 5, 1936

Before Moorman, Hicks and Simons, JJ.

This cause is argued by J. Van Norman for Appellant and by Elmer A. Smith for Appellees and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed March 6, 1936

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

[fol. 124] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed March 6, 1936

Before Moorman, Hicks and Simons, Circuit Judges

SIMONS, Circuit Judge:

The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs commonly known as the combination rule. An understanding of the point in dispute requires exposition of its historical setting.

From the principal sources of lumber supply in the south and southwest to the centers of consuming territory in the north are many rail routes served by numerous carriers.

Shipments of lumber move either at through rates or at combination rates from points of origin to their destination. The through rate is what its name implies, and the combination rate is made up of the local rates of carriers contributing to the route of movement. In 1916 the President of the United States took over control of railroads. By the Federal Control Act of 1918 he was authorized to initiate rates. Increases becoming necessary, by General Order 28 of the Director General of Railroads both through rates and local rates were raised. The result was that where shipments moved over a route for which there had been in effect a published through rate there was but one increase in that rate, but where it moved over a route served by a combination of carriers, each of whose local rates were increased but for which there was no published through rate, the shipper would pay a double and sometimes a triple increase in freight. To avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or "Jones" rule, which so far as applicable is as follows:

"Where no published through rates are in effect from point of origin to point of destination on lumber and articles taking same rates, * * * such through rate will be arrived at in the following manner, * * *"

Then follows the formula by which the applicable rate is determined. The purpose of the rule was concededly to insure that a shipper whose rate was made up of two or [fol. 125] more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase.

The appellants shipped lumber over routes in respect to which there were no published through rates from point of origin to destination. The carriers collected freight on the basis of the local rates in effect over such routes without adjustment by the application of the formula. The shippers complained, and then initiated a proceeding before the Interstate Commerce Commission to obtain a refund of overcharges on the ground that the combination rule was applicable to their shipments. The Commission made awards of reparation on February 9, 1932, in what

is known as the case of Wausau Southern Lumber Co., et al., v. Alabama Great Southern Railway et al., 142 I. C. C. 521, 182 I. C. C. 731. While some of the carriers accepted the decision of the Commission, the present appellees stood their ground and in consequence the shippers filed suit in the court below under § 16(2), of the Interstate Commerce Act, 49 U. S. C. A. On demurrer to the petition the District Judge sustained the contention of the carriers that the combination rule was clear and unambiguous, requiring no construction, that the award of the Interstate Commerce Commission was based upon a conclusion of law and so not binding upon the court; found as a fact that there were through rates applicable to the shipments involved, concluded that the combination rule did not therefore apply to such shipments, and dismissed the petition. It is from the order of dismissal that the appeal is taken.

The first question to be determined is the conclusiveness of the Commission's awards. If the question were one of fact, or involved the exercise of administrative discretion, we are bound by the decision. The Commission, however, was asked to construe a railroad freight tariff. No question was before it as to reasonableness of rates, and while existence of through routes was involved, there was no controversy as to the fact, and no question decided as to the reasonableness of the routes. The question was one of law, and while great deference will be paid to the Commission's conclusions, we are not bound by them. Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. [fol. 126] 97, 99; U. S. v. Missouri Pacific R. Co., 278 U. S. 269, 280. The problem of ascertaining the proper interpretation to be given to a tariff provision is akin to that to be given any other document. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291.

We come then to the wording of the combination rule. The formula is to be applied "where no published through rates are in effect from point of origin to point of destination." The language appears to be clear enough, and there is absent any express qualification thereon. The shippers would, however, have us insert a limitation. They say it necessarily means that the formula is to be applied where no published through rates are in effect over the route of movement, even though in effect over other routes, and that the clause should be interpreted as though it read, "Where

no published through rates are in effect (via route of shipment) from point of origin to point of destination," and that so it has been practically construed by carriers and shippers for many years. Freight tariffs must, however, be applied as written, Western Grain Co. v. St. Louis S. F. Ry. Co., 56 Fed. (2d) 160 (C. C. A. 5), and effect must be given if possible to every word, clause and sentence; Pillsbury Flour Mills Co. v. Great Northern Ry. Co., 25 Fed. (2d) 66 (C. C. A. 8); Chicago Great Western R. Co. v. Farmers' Shipping Ass'n, 59 Fed. (2d) 657 (C. C. A. 10); Updike Grain Corp. v. St. L. & S. F. Ry. Co., 52 Fed. (2d) 94 (C. C. A. 8). The practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument. Norton Iron Works v. Standard Slag Co., 13 Fed. (2d) 622, 623 (C. C. A. 6). Where there is no occasion for construction, the court will be less hesitant to overturn a prior understanding, even though it may have been acted upon for many years. U. S. v. Mo. Pacific Ry. Co., supra, at 280. Further observations in that case in respect to construction by the Commission of a section of the Interstate Commerce Act are peculiarly applicable here.

"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by [fol. 127] the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. * * * Construction may not be substituted for legislation."

It would seem to be clear that when lumber is offered for shipment to the carrier over a designated route, the initial inquiry by the carrier under the guidance of the rule must be as to the existence of a published through rate for the shipment to its destination. If there is no such rate the formula must be applied to a reduction of the combined local rates. If there is such published through rate, the formula is not applied. There is nothing complicated about it, and the shipper having a through rate available is subjected to no unreasonable or inequitable exaction.

The shippers contend, however, that the carriers themselves concede ambiguity to the rule by asserting it, not in strict literalness, but as though it read "Where no pub-

lished through rates (to which the initial carrier is a party) are in effect from point of origin to point of destination." This is to say that the combination formula must be applied only where there is no published through rate from point of origin to destination over the lines of the carrier receiving the shipment, notwithstanding there may be through rates over other lines. But the carriers reply that this is precisely what the rule says, that it can refer only to applicable rates, and that nothing has to be read into it to give it this meaning. This may be a complete answer, but even if not we fail to see how ambiguity in respect to one point in the rule compels interpolation of a limitation in respect to another point. Whether the lack of a published through rate over the lines of the receiving carrier, or the lack of any through rate, conditions the application of the formula, has no bearing upon whether the rule requires construction making applicable the formula where there is no through rate over the route of movement. In any event the point is not here involved because the shipments upon which refunds are claimed all originated with carriers who were parties to through published rates at the point of origin.

Finally it is urged that the decision in Baltimore & Ohio Railroad Co. v. Domestic Hardwoods, Inc., 65 Fed. (2d) 488 [fol. 128] (C. of A. D. C.), approving the construction of the Commission upon the rule before us, is conclusive of this case. Persuasive it might be, were its reasoning fully to commend itself to us. In what respect it controls our decision we are unable to understand. If upon the ground that certiorari was denied by the Supreme Court (290 U. S. 647), then the answer must be in the language of that court "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." Atlantic Coast Line Rd. v. Powe, 283 U. S. 401, 403; United States v. Carver, 260 U. S. 482, 490. The Court of Appeals of the District of Columbia in the B. & O. case sustained the Commission's construction on the ground that it was conceivable that through rates might be established over longer routes and through congested centers which would so increase costs and delay delivery as to be unavailable to shippers requiring dispatch, shipping perishable merchandise, and others. The court, however, apparently overlooked the fact that the Commis-

sion has power to require carriers to establish additional through routes whenever necessary or desirable in the public interest, and the power to fix rates over such routes under § 15, paragraph (3), of the Interstate Commerce Act, and that there was in that case no question in respect to the exercise of the administrative powers of the Commission. Likewise there is none here. Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigency requires. We are therefore unable to follow the reasoning of the Court of Appeals of the District of Columbia to its conclusion.

The order of the District Court is affirmed.

[fol. 129] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 131] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed October 21, 1936

It is hereby stipulated and agreed by and between counsel for appellants and appellees in the above-entitled cause

that the printed transcript of the record herein shall include the proceedings in the United States Circuit Court of Appeals for the Sixth Circuit, consisting of the opinion of the said Court and the certificate of the Clerk of the said Court, and the record in this cause in the District Court of the United States for the Western District of Kentucky, as printed in the transcript of record filed in the United States Circuit Court of Appeals for the Sixth Circuit, except the list of complainants, defendants and amounts appearing on page 28 and continuing to the top of page 52, inclusive, and except the list of plaintiffs, defendants and amounts appearing at pages 63 to 83, inclusive.

Dated this 20th day of October, 1936.

J. V. Norman, Counsel for Appellants. Elmer A. Smith, Counsel for Appellees.

[fol. 132] [File endorsement omitted.]

Endorsed on cover: File No. 40,640. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 100. W. P. Brown & Sons Lumber Company et al., petitioners, vs. Louisville & Nashville Railroad Company et al. Petition for a writ of certiorari and exhibit thereto. Filed June 3, 1936. Term No. 100, O. T., 1936.

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Supreme Court of the United States

OCTOBER TERM, 1935.

100

W. P. BROWN & SONS LUMBER COMPANY, ET AL., - - - - - - - - - - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
May 29, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1935.

W. P. BROWN & SONS LUMBER COMPANY,
ET AL., - - - - - - - - - - *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL., - - - - - - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States:

Comes W. P. Brown & Sons Lumber Company, and other appellants whose names are set forth at pages one to four of the transcript of record filed herewith, and jointly and severally petition this Court to review, on writ of certiorari, a decision of the United States Circuit Court of Appeals for the Sixth Circuit, as same appears in the opinion of that Court, rendered March 6, 1936, in which decision the respondents herein, Louisville & Nashville Railroad, and other railroad companies as set forth on pages four to seven of the transcript of record filed herewith, were the successful parties adversary to these petitioners.

I.

The decision sought to be reviewed affirmed the judgment of the District Court of the United States for the Western District of Kentucky. The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs, commonly known as the combination or "Jones" rule. The history of the controversy is concisely set forth in the opinion of the Circuit Court of Appeals for the Sixth Circuit, as follows (R. 124):

> "The controversy is between shippers of lumber and carriers in respect to construction of a rule in freight tariffs commonly known as the combination rule. An understanding of the point in dispute requires exposition of its historical setting.
>
> "From the principal sources of lumber supply in the south and southwest to the centers of consuming territory in the north are many rail routes served by numerous carriers. Shipments of lumber move either at through rates or at combination rates from points of origin to their destination. The through rate is what its name implies, and the combination rate is made up of the local rates of carriers contributing to the route of movement. In 1916 the President of the United States took over control of railroads. By the Federal Control Act of 1918 he was authorized to initiate rates. Increases becoming necessary, by General Order 28 of the Director General of Railroads both through rates and local rates were raised. The result was that where shipments moved over

a route for which there had been in effect a published through rate there was but one increase in that rate, but where it moved over a route served by a combination of carriers, each of whose local rates were increased but for which there was no published through rate, the shipper would pay a double and sometimes a triple increase in freight. To avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule, which so far as applicable is as follows:

> "'Where no published through rates are in effect from point of origin to point of destination on lumber and articles taking same rates, * * * such through rate will be arrived at in the following manner, * * *.'

"Then follows the formula by which the applicable rate is determined. The purpose of the rule was concededly to insure that a shipper whose rate was made up of two or more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase.

"The appellants shipped lumber over routes in respect to which there was no published through rates from point of origin to destination. The carriers collected freight on the basis of the local rates in effect over such routes without adjustment by the application of the formula. The shippers complained, and then initiated a proceeding before the Interstate Commerce Commission to obtain a refund of overcharges on the ground that the combination rule was applicable to their ship-

ments. The Commission made awards of reparation on February 9, 1932, in what is known as the case of *Wausau Southern Lumber Co., et al.,* v. *Alabama Great Southern Railway, et al.,* 142 I. C. C. 521, 182 I. C. C. 731. While some of the carriers accepted the decision of the Commission, the present appellees stood their ground and in consequence the shippers filed suit in the court below under Sec. 16(2), of the Interstate Commerce Act, 49 U. S. C. A. On demurrer to the petition the District Judge sustained the contention of the carriers that the combination rule was clear and unambiguous, requiring no construction, that the award of the Interstate Commerce Commission was based upon a conclusion of law and so not binding upon the court; found as a fact that there were through rates applicable to the shipments involved, concluded that the combination rule did not therefore apply to such shipments, and dismissed the petition."

The foregoing correctly recites the history of the controversy but the statement that the purpose of the rule was "to avoid the inequality between shippers having access to stations which publish through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule * * *" is a conclusion of the Court and is erroneous. Likewise the statement that the District Judge "found as a fact that there were through rates applicable to the shipments involved" is in error since the District Judge made no findings of fact. His ruling was on demurrer and he merely stated that the record showed

that there were published through rates in effect at the time of the shipments but it is admitted that these rates did not apply via the route of movement and were not the rates assessed.

The Circuit Court of Appeals for the Sixth Circuit on March 6, 1936, affirmed the judgment of the lower court (82 F. (2d) 94) (R. 123).

II.

GROUNDS RELIED ON FOR ALLOWANCE OF WRIT.

The grounds relied on for allowance of the writ are:

1. The decision herein by the Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision by the Court of Appeals of the District of Columbia on the same subject matter, in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., et al.*, 65 F. (2d) 488, and review of the decision herein is necessary to secure uniformity of decision.

In both cases the question at issue was the application and construction of the identical provision of the so-called combination or "Jones" rule. The Court of Appeals for the District of Columbia affirmed the decision of the Supreme Court of the District of Columbia, upholding the construction of the Interstate Commerce Commission and sustaining awards of reparation made pursuant thereto. The ruling of the Interstate Commerce Commission, thus upheld, was to the effect that the Jones rule applied where there was no joint through rate *via route of movement,* al-

though joint through rates were in effect by other routes, both tariffs carrying the combination rates having incorporated the Jones rule therein by reference.

In the case sought to be here reviewed, the Circuit Court of Appeals for the Sixth Circuit held that the rule did not apply where there were joint through rates *via any route* although there was no joint through rate via the route of movement and although both tariffs publishing the combination rates incorporated the Jones rule by reference thereto. In both cases there were through joint rates via other routes than the route of movement. The two cases therefore dealt with exactly the same subject matter and are in irreconcilable conflict.

The Circuit Court of Appeals for the Sixth Circuit discussed the decision of the Court of Appeals for the District of Columbia, rejected the reasoning and the findings thereof, and refused to follow same.

2. The question is one of general importance and relates to the construction and application of a railroad tariff provision, which, in the interest of certainty and uniformity, should be settled by this Court.

The question is not alone as to whether rates referred to in the Combination Rule shall be held to be rates by route of movement of shipment under such rule, but also whether tariff rates shall be held to be generally applicable to the route of movement or to the service performed rather than to some other route or to some other service.

Under the decision of the Court of Appeals for the District of Columbia affirming the ruling of the Interstate Commerce Commission, the rule here, and therefore tariffs generally, are held to be applicable to the route of movement, whereas under the decision of the Circuit Court of Appeals for the Sixth Circuit it is held that the rates named in the tariff are or may be rates by some other route than the route of movement.

3. The Commission's interpretation of the effect and application of the tariff provision involved administrative questions and should be sustained.

Here preliminary resort to the Interstate Commerce Commission was necessary since the question presented involved, as stated by the Court of Appeals for the District of Columbia, "more than a mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court." The Court of Appeals for the Sixth Circuit erroneously held to the contrary that no administrative question was involved and that "the question was one of law."

4. The question presented involves also the weight to be given to contemporaneous construction of railroad tariffs, which is also a question of general importance.

Here it is admitted that both shippers and carriers, for a number of years, construed the tariff as being applicable where there was no through joint rate *via route of movement*. When the carriers sought to

change the tariff by inserting the words "via any route," so as to make the plain language of the tariff restrict its application in the manner for which the carriers now contend, the Interstate Commerce Commission declined to permit such amendment (81 I. C. C. 745).

The Circuit Court of Appeals for the Sixth Circuit, in the decision here sought to be reviewed, erroneously declined to give weight to the contemporaneous construction of shippers and carriers and the Interstate Commerce Commission and held that "the practical construction of parties to a contract is not permitted to defeat the clear language of the instrument."

5. The decision sought to be reviewed results in requiring the shipper to examine tariffs other than those publishing rates covering the service desired by him and deprives him of his statutory right to route his shipments.

If a shipper desired to ship lumber from a point in the south via Cincinnati to a point in the north, he would, under the decision sought to be reviewed, in order to ascertain the rate applicable, be required to examine not only the tariffs carrying the rate for such service but other tariffs to which the initial carrier may be a party, to ascertain whether such other tariffs carried a through joint rate between the point of origin and destination via some other route. The law gives to the shipper the right to route his shipment and there may be many reasons why he desires to route it via a given point, such as Cincinnati. One of these reasons may be that he wants to stop it at Cincinnati

for drying, dressing or some other treatment which the tariffs permit. It is because of such situations that the Congress has expressly provided by Subsection 8 of Section 15, of the Interstate Commerce Act (49 Stat. L. 543), that the shipper may designate in writing the route over which he desires his property to be transported and that the carrier shall observe such routing and transport property over the route designated. The decision here sought to be reviewed erroneously deprives the shipper of that right unless the shipper be willing to pay a double increase in his rate in order to enjoy such right.

6. The decision sought to be reviewed results in closing routes heretofore open and which the Interstate Commerce Commission has expressly held to be reasonable routes.

Under the construction of the Jones Rule by the Circuit Court of Appeals for the Sixth Circuit, the rate via the routes to which the combination rates apply suffers double increases if there be a through joint rate via some other route. As a practical matter this would close these routes. The Interstate Commerce Commission, in this case, expressly held that these routes were reasonable routes and should not be closed and the Circuit Court of Appeals for the Sixth Circuit erroneously set aside said ruling.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, requiring it to certify and send to this Court a full and complete transcript

of the record and all proceedings in the case numbered and entitled on its Docket No. 6915, *W. P. Brown & Sons Lumber Company, et al., Appellants, v. Louisville & Nashville Railroad Company, et al., Defendants,* to the end that this cause may be reviewed and determined by this Court, and that the judgment herein of said Circuit Court of Appeals be reversed, and for such further relief as to this Court may seem proper.

W. P. BROWN & SONS LUMBER COMPANY,
AND OTHER PETITIONERS,
BY J. V. NORMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS.

The opinion of the Court of Appeals for the Sixth Circuit, filed on March 6, 1936, and reported in 82 F. (2d) 94, is printed in the record at pages 124 to 128.

The opinion of the Court of Appeals for the District of Columbia, in the case of *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., et al.,* with which the opinion here is claimed to be in conflict, is reported in 65 F. (2d) 488.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 204 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (C. 229, Sec. 1-43, Stat., 938, 28 U. S. C. A. Sec. 347 (a)).

The date of the judgment to be reviewed is March 6, 1936 (R. 123).

STATEMENT OF THE CASE.

The foregoing petition for writ of certiorari contains a concise statement of the case and, in the interest of brevity and to avoid repetition, is hereby referred to. No attempt will here be made to argue the case in chief, but this brief will be confined to a

discussion of the grounds on which the writ is sought, with a view to justifying the granting of said petition.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

We would, upon review, contend that the Court of Appeals for the Sixth Circuit erred:

1. In holding that the tariff rule in question was not applicable where there was a through joint rate between point of origin and destination *via any route.*

2. In failing to hold that the tariff rule in question was applicable unless there was a through joint rate *via route of movement.*

3. In holding that the construction and application of the tariff rule in question by the Interstate Commerce Commission involved no administrative question and was entitled to no weight.

4. In failing to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers and by the Interstate Commerce Commission.

5. In holding that the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, was unsound and in refusing to follow same.

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN ITS CONSTRUCTION OF THE TARIFF RULE IN QUESTION (SPECIFICATION OF ERRORS 1 AND 2).

The contention of the parties, as to the construction of the tariff rule in question, may best be illustrated by reading the rule with the contention of each party shown in parenthesis, as follows:

> "Where no published through rates are in ef-
> carrier shipper
> fect (via any route) (via route of shipment) from point of origin to point of destination, * * *."

The court below held that the shippers would have the Court "insert a limitation," thereby referring to the contention of the shippers that the rule should be read as applicable only to the route of shipment. The Court, however, made no reference to the contention of the carriers that there must be read into the rule the words "via any route," and this notwithstanding the fact that the carriers had attempted to amend their tariffs by inserting said words "via any route" and the Interstate Commerce Commission had declined to permit them to do so. *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi Crossings,* 81 I. C. C. 745.

The Court failed to give weight to the construction and application of the tariff rule in question by the Interstate Commerce Commission although the con-

struction adopted by the Court results in closing routes which the Interstate Commerce Commission had held to be reasonable. The construction adopted by the Court also fails to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers as well as the Interstate Commerce Commission. The Court also erred in failing to give weight to the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, and in failing to follow same.

WEIGHT TO BE GIVEN TO THE COMMISSION'S INTERPRETATION AND APPLICATION OF THE TARIFF.

This Court, in *I. C. R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, in referring to the weight which should be given to the Commission's finding, stated:

> "This Court has ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience."

In *Davis, D. G.*, v. *Prairie Pipeline Co.*, 289 F. 393, the Circuit Court of Appeals, for the 8th Circuit, said:

> "The construction of a freight tariff is a question of law, *G. N. Ry. Co., et al.*, v. *Merchants Elev. Co.*, 259 U. S. 285, 66 L. Ed. 943. The relation, however, of tariffs one to another in a common territory is not entirely a question of law,

> but more in the nature of a mixed question of law and fact. We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

We have here a question that has been passed upon by the Commission in a long line of cases, which establish a settled administrative construction. This construction must be given great weight by the Court. This principle is declared by the Supreme Court in *Logan* v. *Davis*, 233 U. S. 613, where it said:

> "The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute, by the executive department charged with its administration, is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons."

The first case in which the Commission decided this question was *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi Crossings*, 81 I. C. C. 745, in which case the southern carriers attempted to change their tariffs so as to specifically provide the rule for which they now contend. The Commission said:

> "Protestants further maintain that the language of the rule in the Jones' tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there

is a joint through rate in effect over the route of movement. This, in our opinion, has been the generally accepted interpretation of the rule and much traffic has moved over these so-called unauthorized routes under this interpretation since the inception of the rule."

This ruling has been consistently followed by the Commission since that case, and the following are some of the cases considering the question:

Cancellation Rule for Combination Rates, 93 I. C. C. 614,
M'Gowin-Foshee Lumber Co. v. *A. F. & G. Ry. Co.*, 95 I. C. C. 451,
Moore Marshall Lumber Co. v. *N. O. & N. E. R. R.*, 112 I. C. C. 333,
Gunther & Co. v. *L. & N. R. R.*, 112 I. C. C. 387,
Eiler Lumber Co. v. *M. P.*, 161 I. C. C. 413,
Brabston v. *L. & N.*, 175 I. C. C. 421,
Domestic Hardwoods, Inc., v. *B. & O.*, 168 I. C. C. 753,
Milne Lumber Co. v. *N. Y. C.*, 152 I. C. C. 65,
Held v. *C. C. C. & St. L. Ry.*, 161 I. C. C. 413.

The last mentioned decision of the Commission was upheld by the Circuit Court of Appeals for the District of Columbia, in *B. & O.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488, and review was denied by this Court (290 U. S. 647).

PRELIMINARY RESORT TO THE COMMISSION IN THIS CASE WAS NOT ONLY PROPER, BUT NECESSARY.

A considerable part of the brief for the defendants, in the court below, was devoted to an argument seeking to establish that no preliminary resort to the Commission was necessary in this case. That the application to the Commission, rather than the Court, was proper, was not challenged by the defendants and, of course, cannot be since Section 9 of the Interstate Commerce Act (U. S. C. A., Title 49, Sec. 9), specifically provides that any person claiming to be damaged by any common carrier, subject to the provisions of the Interstate Commerce Act, may either make complaint to the Commission or bring suit in any District Court of the United States of competent jurisdiction.

We maintain, however, that application to the Commission in this case was not only proper, but absolutely necessary. As heretofore pointed out, there may be cases where no application to the Commission is necessary, where there is involved no question of fact or law calling for administrative functions.

But where there are administrative questions present, either of fact or of law, resort to the Commission is necessary. As to the question of fact, the decision of the Commission is final unless arbitrary or unreasonable. Where the Commission exercises *quasi*-judicial functions, its opinion is needed in an advisory

capacity and is highly persuasive unless palpably wrong.

The case here presents questions as to which the findings of the Commission were necessary on questions of fact and also in a *quasi*-judicial capacity. Chief among the questions of fact was the question whether or not the routes over which the shipment moved, or should have moved, were reasonable routes. There can be no doubt but that this is an administrative question and its determination is binding upon this Court.

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, this Court had before it the question whether preliminary resort to the Commission was necessary where there was involved the question of the reasonableness of the carriers' practice of shipping over the interstate route between two points, rather than a cheaper intrastate route between the same points. The Court held that this question was one to be determined by the Commission, and said:

> "The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

See also *Board of Railroad Commissioners* v. *Great Northern Railroad*, 281 U. S. 412.

The Commission's decision was likewise necessary in a *quasi*-judicial capacity. The construction of the tariff involved knowledge of intricate transportation matters, such as relation of tariffs one to another, knowledge of the history of the conditions under which this provision was incorporated in the tariff, and the contemporaneous construction placed thereon by the Commission, the carriers and the shippers. In such circumstances, this Court has held that initial resort to the Commission is necessary. In considering this question the Court said, in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

And in *Davis, D. G.*, v. *Prairie Pipeline Co., supra,* the Court said:

> "The construction of a freight tariff is a question of law. * * * The relation, however, of tariffs one to another in a common territory is not entirely a question of law but more in the nature of a mixed question of law and fact."

This question goes far deeper than a matter of procedure alone. It means that the Commission's advice is absolutely necessary and that its opinion should be followed, certainly on a settled question of construction of long standing.

THE COURT BELOW ERRED IN FAILING TO GIVE PROPER OR ANY WEIGHT TO THE CONTEMPORANEOUS CONSTRUCTION OF THE TARIFF RULE IN QUESTION, AS MADE FOR MANY YEARS BY CARRIERS AND SHIPPERS AND BY THE INTERSTATE COMMERCE COMMISSION.

In the amendment to the petition herein, it is alleged as follows (R. 85):

> "For several years after 1920 the railroads applied the aforesaid 'Combination Rule' to the shipments of lumber for the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 743 and 93 I. C. C. 614."

On demurrer this allegation must, of course, be taken as true. Moreover, when the carriers undertook to amend the tariffs by inserting the words "via any route" and contended that the amendment to the tariff was merely to clarify the tariff and make certain that which the tariff already provided when properly construed, the Commission, in declining to permit the amendments, said:

> "It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. *The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that the respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.*" *Cancellation Rule for Combination Rates*, 81 I. C. C. 745. (Italics ours.)

It will be noted that the Commission here states that "both the carriers and shippers have in the past put a different construction on the application of this Combination Rule," that is, a construction different from that for which the amended tariffs provided, which was to apply the rule to cases where there was no through joint rate *via any route*.

It therefore appears that the contemporaneous construction of all interested parties was in accord with the construction here made by the Commission, and for which we contend. It is necessary to cite only a few cases showing the weight to be given to the contemporaneous construction of documents by the parties.

As pointed out by the Court in *Union Wire Corp.* v. *A. T. & S. F. Ry. Co.*, 68 F. (2d) 965, a promulgated tariff partakes of the nature of a contract; and, as pointed out in *Updike Grain Co.* v. *C. & N. Y. Ry.*, 35 F. (2d) 486:

> "While there may be some rules of construction peculiarly applicable to a railroad tariff, yet ordinarily the rules governing the construction of other documents have been applied by the courts to such tariffs."

The universal rule as to the weight of contemporaneous construction of ambiguous documents was stated by this Court in *District of Columbia* v. *Gallaher*, 124 U. S. 505, as follows:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

And in *Michigan Home Colony* v. *Tabor*, 141 F. 332:

> "These facts, without more, show that the parties construed the covenants of their contract to be mutual and dependent. If the literal meaning of the covenants in question were in doubt, the practical construction which was put upon them by the parties must prevail."

And in *Manhattan Life Insurance Co.* v. *Wright*, 126 F. 82:

> "The practical interpretation given to the contract by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors."

Further citation of authorities would be superfluous.

THE COURT BELOW ERRED IN HOLDING THAT THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, IN BALTIMORE & OHIO v. DOMESTIC HARDWOODS, INC., 65 F. (2d) 488, WAS UNSOUND AND IN REFUSING TO FOLLOW SAME.

The Court below discussed the case of *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc., supra,* and gave its reasons for its conclusions that said decision was unsound and for its refusal to follow same in the following language (R. 127 and 128):

"Finally it is urged that the decision in *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488 (C. of A. D. C.), approving the construction of the Commission upon the rule before us, is conclusive of this case. Persuasive it might be, were its reasoning fully to commend itself to us. In what respect it controls our decision we are unable to understand. If upon the ground that certiorari was denied by the Supreme Court (290 U. S. 647), then the answer must be in the language of that court 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' *Atlantic Coast Line Rd.* v. *Powe*, 283 U. S. 401, 403; *United States* v. *Carver*, 260 U. S. 482, 490. The Court of Appeals of the District of Columbia in the B. & O. case sustained the Commission's construction on the ground that it was conceivable that through rates might be established over longer routes and through congested centers which would so increase costs and delay delivery as to be unavailable to shippers requiring dispatch, shipping perishable merchandise, and others. The court, however, apparently overlooked the fact that the Commission has power to require carriers to establish additional through routes whenever necessary or desirable in the public interest, and the power to fix rates over such routes under Sec. 15, paragraph (3), of the Interstate Commerce Act, and that there was in that case no question in respect to the exercise of the administrative powers of the Commission. Likewise there is none here. Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not

upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigencies requires. We are therefore unable to follow the reasoning of the Court of Appeals of the District of Columbia to its conclusion."

It will be seen that the court below criticizes the opinion of the Court of Appeals for the District of Columbia because (a) it held that if the carriers' construction were sustained it might result in the establishment of routes that were unreasonable and were not the most direct, and (b) because it gave weight to the Commission's ruling "on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court." As to the first question, the question of routing, the Court of Appeals of the District of Columbia was undoubtedly right because the construction contended for by the carriers did result in closing routes and in leaving open only the routes by which through joint rates apply. As to these later routes, the Interstate Commerce Commission found as follows (R. 94):

> "The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."

As to the second question, the Court of Appeals of the District of Columbia, said:

> "But it should be remembered that the question involves more than the mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court. But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural."

Undoubtedly the Circuit Court of Appeals of the District of Columbia was right in the foregoing statement. The construction of the tariff rule here in question does involve the construction of railroad rates and routings. It also involves the relation of tariffs one to another, which the Circuit Court of Appeals for the Eighth Circuit, in *Davis D. G.* v. *Prairie Pipeline Co., supra,* said "is not entirely a question of law but

more in the nature of a mixed question of law and fact."

CONCLUSION.

Without attempting to further summarize or argue the points involved, we submit that they are of such importance in the construction and application of railroad tariffs that the conflict in the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Court of Appeals of the District of Columbia should be settled by this Court, to the end that certainty and uniformity may be established.

WHEREFORE, it is respectfully urged that the Court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
May 29, 1936.

FILE COPY

DEC 5 19

CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL., - - - - - - - Respondents.

BRIEF FOR PETITIONERS.

J. V. NORMAN,

Counsel for Petitioners.

Dated at:

Louisville, Ky.,

November 23, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD CO.,
ET AL., - - - - - - - - *Respondents.*

BRIEF FOR PETITIONERS.

OPINION OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals, which is here under review, is reported in 82 Fed. (2d) 94 (R. 74-79). The opinion of the United States District Court for the Western District of Kentucky, which was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, is reported in 7 Fed. Supp. 593 (R. 65-67). The opinions of the Interstate Commerce Commission construing the tariff rule and awarding the reparation, here sought to be recovered, are reported in 142 I. C. C. 521 (R. 40-54), and 182 I. C. C. 731 (R. 13-24).

STATEMENT OF JURISDICTION.

The case is here on writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, granted by this Court on October 12, 1936.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to review a judgment of that Court affirming a judgment of the District Court for the Western District of Kentucky dismissing, upon demurrer and refusal of the plaintiff to plead further, the petition of the plaintiffs, as amended, against the Louisville & Nashville Railroad Co., and other carrier defendants, which sought a judgment of $14,972.27, with interest, upon an award of reparation of the Interstate Commerce Commission.

The question involved, when originally presented to the Interstate Commerce Commission, was one partially adminstrative and partially judicial, but as presented to the Court below was one of law only, which, when decided, would decide the entire case; and consequently the demurrer was treated by the District Court as disposing of the case and suit was dismissed on the ground that the petition, as amended, stated no cause of action.

The question originally presented to the Interstate Commerce Commission was one of tariff construction

and application. There is now presented the additional question as to whether the decision of the Interstate Commerce Commission is here controlling. Specifically, the question of tariff construction involves the question whether the so-called "Combination Rule" should or should not be applied where there was no published through (joint) rate from point of origin to point of destination over the route the consignment moved, or should have been shipped, or was billed to be shipped, although there was a joint through rate over some other route from point of origin to point of destination.

The origin and purpose of the rule, together with the rule itself and explanation of its application, is set forth by the Interstate Commerce Commission in its original report herein, as follows (R. 45-46):

> "The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. It reads in part as follows:
>
> "'Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other forest prod-

ucts, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):'

"The formula which follows provides that the separately established commodity rate factors, except where they do not aggregate more than 30 cents, should be reduced by amounts ranging from 0.5 cents for factors under 4 cents to 6 cents for factors 29 cents or over, and that 6 cents should be added to the sum of all factors. This rule has remained substantially the same since its first publication in February, 1919, except that arbitraries and other amounts shown therein were increased on December 1, 1920, and reduced on July 1, 1922, to reflect the general increase and reduction.

"The joint rates on lumber from and to the points here considered rarely exceeded the combination rates over other routes even when reduced by the use of the combination rule, until after the general increase of 1920. Owing to the variance in the percentage increases in rates authorized within and between the territorial groups, 25 per cent south of the Ohio River, 40 per cent north thereof, 35 per cent west of the Mississippi River, and 33-1/3 per cent in the interterritorial joint rates, the formula did not produce exact results, but, as effective December 1, 1920, was designed to

increase combination rates approximately 33-1/3 per cent."

For several years, in fact until 1923, the carriers, the shippers and the Interstate Commerce Commission (hereinafter called Commission) construed this rule to mean that the combination rate factors treated by the rule, not the full factors, applied where there was no through joint rate from point of origin to point of destination over the route used, or which should have been used if the shipment were unrouted, although there was a published through joint rate over some other route, the construction now contended for by the plaintiffs (R. 39). In 1923, for the first time, the Southern carriers took the position that this rule meant that the full factors in the combination over route of movement had to be charged where there was a through joint rate via *any route* from point of origin to point of destination, and assessed charges accordingly, resulting in the overcharges for which an award was made to the plaintiffs here by the Commission (R. 39). The result is that where the Combination Rule was not applied a shipment moving over a route via which there was no joint rate received a double advance owing to the use of the full factors, each of which had been increased.

In 1923 the carriers filed with the Commission an amendment to the tariff, whereby they proposed to restrict the application of the so-called "Combination Rule" for constructing lumber rates from the Mississippi Valley and Southeastern points of origin to Ohio

and Mississippi River crossings when the shipments are destined for points beyond these crossings, by inserting in the rule the words "via any route," which they now contend are to be read into the rule. The Commission suspended said amendment to the tariff and, after hearing, declined to permit same to become effective, and ordered same to be cancelled. The Commission's reports, so holding, are found in 81 I. C. C. 745, and in 93 I. C. C. 614. The carriers nevertheless proceeded to assess charges as though said words had been included in the rule (R. 39).

The contention of the parties may best be illustrated by reading the rule with the contention of each party shown in parentheses, as follows:

> "Where no published through rates are in
> carrier shipper
> effect (via any route) (via route of shipment)
> from point of origin to point of destination, * * *."

A further addition is necessary, however, in order to show correctly the carriers' contention, since they concede the through route must be one to which the initial carrier is a party, and therefore they contend the rule should be interpreted as though it read:

> "Where no published through rates (to which the initial carrier is a party) are in effect (via any route) from point of origin to point of destination, * * *."

STATEMENT OF FACTS.

As the case below turned upon demurrers to the petition, as amended, and to the answer, as amended, the entire substantive record consists of these pleadings, with the exhibits filed with each. These pleadings, however, set forth the entire case, which may be summarized as follows:

1. PETITION AS AMENDED: This was a suit originally filed in the District Court for the Western District of Kentucky by W. P. Brown & Sons Lumber Co., and other plaintiffs, against the Louisville & Nashville Railroad Co., and other carrier defendants, seeking, in the first instance, a judgment of $32,974.77, upon an award of the Commission. The suit was filed under authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, U. S. C. A., Title 49, §16 (R. 1-12). Later the judgment sought was reduced to $14,972.27, with interest, by reason of settlements, and payments made by certain of the defendants on a part of the awards (R. 1-12; 35-40).

Before bringing the suit in the District Court, the plaintiffs first made application to the Commission for reparations in complaints filed with the Commission, numbered 17,068, 17,858, 17,224, 17,298, 17,407 and 17,957. These complaints were filed between April 11, 1925, and January 21, 1926 (R. 8-9; 42), and were heard April 23 and 24, 1926, and decided May 8, 1928, and February 9, 1932. In these reparation complaints

before the Commission, the plaintiffs pleaded the issuance of the Combination Rule, its construction up until 1923, the change then made by the defendants, southern carriers, which proceeded to charge the full combination rate without application of the Combination Rule in cases where there was a through joint rate *via any route;* and that any charge made by the defendant, in such instance, in excess of the combination rate, reduced by application of the Rule, was illegal, for which reparation should be made (R. 1-12).

The cases before the Commission then went to issue, proof was taken on the application of the tariffs, on the shipments made, and the charge made therefor by the defendants, and the Commission then rendered its first report on May 8, 1928 (R. 40-54). This report appears in 142 I. C. C. 521. In it the Commission pointed out:

(1) That the shipments may be divided into three classes (a) those specifically routed by plaintiffs over routes where there was no through joint rate; (b) those tendered to defendants unrouted, which should have moved over routes where the combination rate applied rather than the through rate and (c) those forwarded over initial carriers not participating in joint through rates from point of origin to point of destination;

(2) That, as it had always held, all ambiguities in a tariff must be construed against the carrier; and

(3) That it had theretofore repeatedly held that the combination rate applied over route of shipment if there was no joint through rate over this route, even though there was a joint through rate over another route from point of origin to point of destination.

Based on this the Commission found (R. 49-50):

(1) That the applicable rates were those over the route of movement and if there was no through rate over such route, the combination rate, as reduced by the combination rule, applied and any charges in excess, in such cases, were overcharges;

(2) That where the shipments were delivered with routing instructions over routes where there was no joint through rate, and the shipments were forwarded over another route, there was a misrouting and the plaintiffs were damaged to the extent of any overcharges by reason of such misrouting; and

(3) That where the shipments were delivered with no routing instructions, or incomplete instructions, it was the duty of the defendant carriers to forward over the cheapest route, and any variance from this constituted a misrouting, and the plaintiffs were damaged to the extent of any overcharges resulting therefrom.

The entire matter was again reviewed before the Commission, which made a second report on February 9, 1932, 182 I. C. C. 731 (R. 13-24). In this report the Commission reviewed the case, adhered to its findings

in the former report, and entered an order directing the carriers to pay the plaintiffs, the various amounts tabulated in the order, on or before April 28, 1932 (R. 24-27). Some of the carriers, defendants herein, failed to do this and this suit was filed on February 6, 1933, based upon the order of the Commission.

2. THE ANSWER AS AMENDED: The answer of the defendants and amendments thereto, may be found in the record, pages 27-34, 54-62. The first paragraph of this answer consists of denials of certain allegations in the petition, which, however, need not be considered because the case turned on demurrer, and, under settled rules of construction, all allegations in the petition must be taken as admitted.

The second paragraph of the answer pleads affirmatively, and in a general way, that the order of the Commission, on which this suit is based, is invalid because it does not contain sufficient findings of fact. Neither the District Court nor the Circuit Court of Appeals considered this point, but decided that the demurrer to the petition, as amended, must be sustained.

The third paragraph pleads affirmatively that, as a matter of law, the Commission erred in construing the Combination Rule to apply where there was no joint through rate via route of shipment, if there was a joint through rate over *any route* from point of origin to point of destination. A demurrer was filed to this paragraph by the plaintiffs. which squarely raised the issue at law, decided by the Courts below.

3. THE ADOPTION, EFFECT AND HISTORY OF THE "COMBINATION RULE" (R. 38-39): Originally rates on lumber from the Pine Belt, in southern territory, to points north of the Ohio River, were published as separate factors, and the through rate was arrived at by adding these separate factors. Later these combinations were checked out and in many instances the lowest combination was published as the through rate via designated routes. In 1918, by General Order No. 28, the Director General increased the rates on lumber 25%, subject to a maximum increase of 5 cents per 100 pounds in any rate. In order to observe this maximum when through rates were made on combination, the Director General published the Combination Rule. Briefly stated, the rule provided that where combination rates on lumber aggregated more than 25 cents, each factor was to be reduced 20%, subject to a maximum reduction of 5 cents on any one factor with the addition of the flat amount of 5 cents per one hundred pounds to the sum of the factors so reduced.

At that time the rule had little application on lumber shipped from the South to north of the Ohio River, because under the 1918 general advance of the Director General the percentage increase in the South, in the north and between these territories was 25%. It came into application generally in 1920 by reason of (a) a 25% increase in rates in the south, (b) a 40% increase in rates in the north, and (c) a 33⅓% increase in the overhead rates, authorized by the Commission, in *Ex Parte 74,* 58 I. C. C. 220. This rule had applica-

tion through various changes in rates not necessary to outline here.

For several years after 1920, the carriers applied the Combination Rule to shipments of lumber from the South, or made refunds if not applied. In 1923 the southern carriers, for the first time, took the position that the rule did not apply in cases where there was a through joint rate by any route, and undertook to amend their tariffs to this effect, but the Commission declined to permit this amendment, on the ground, among others, that it would increase rates by routes which it held to be reasonable routes that should be kept open, 81 I. C. C. 745, 93 I. C. C. 614.

Notwithstanding the ruling of the Commission, the southern carriers continued to refuse to apply the rule, which resulted in these reparation complaints before the Commission, which are the basis of this suit.

4. DEMURRERS: A demurrer was filed by the defendants, to the petition, as amended (R. 63); and the plaintiffs filed a demurrer to paragraphs II, III and IV of the answer (R. 64-65).

5. OPINION OF THE DISTRICT COURT: In a memorandum opinion (R. 65-67) the District Court held that the Combination Rule was unambiguous, that the question presented was one of law and the decision of the Commission, while entitled to respect, was not binding or controlling upon the courts; that the rule plainly meant that it was not to be applied where there was a through joint rate via any route from point of origin to point of destination. The District Court

cited no authority and totally disregarded (1) the construction placed on the rule by the Commission, (2) the construction placed on the rule by the defendants themselves until 1923, and (3) the decision of the Court of Appeals of the District of Columbia in *B. & O.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488. Thereupon an order was entered (R. 67) sustaining the demurrer to the petition, as amended, and dismissing the suit. From this order appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

6. OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS: In its opinion (R. 74-79), the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, held that the rule did not apply where there were joint through rates *via any route* although there was no joint through rate via the route of movement and although both tariffs publishing combination rates incorporated the Combination Rule by reference thereto. In reaching this conclusion the Circuit Court of Appeals held that the question involved was one of law and since it does not involve the exercise of administrative discretion, the Court was not bound by the decision of the Commission; that there was no ambiguity in the rule; that the Court was unable to follow the reasoning of the Court of Appeals of the District of Columbia in *B. & O.* v. *Domestic Hardwoods, Inc., supra,* and that the contemporaneous construction of the railroads and the shippers and the Commission should not be permitted to defeat the clear language of the rule.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

In the brief of petitioners in support of the application for writ of certiorari there is set out, as required by the rules, a specification of errors intended to be urged if the review be granted. This specification is as follows:

"We would, upon review, contend that the Court of Appeals for the Sixth Circuit erred:

"1. In holding that the tariff rule in question was not applicable where there was a through joint rate between point of origin and destination *via any route.*

"2. In failing to hold that the tariff rule in question was applicable unless there was a through joint rate *via route of movement.*

"3. In holding that the construction and application of the tariff rule in question by the Interstate Commerce Commission involved no administrative question and was entitled to no weight.

"4. In failing to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers and by the Interstate Commerce Commission.

"5. In holding that the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio* v. *Domestic Hardwoods, Inc.,* 65 Fed. (2d) 488, was unsound and in refusing to follow same."

SUMMARY OF ARGUMENT.

1. Preliminary resort to the Commission in this case was not only proper but necessary. This is so because interpretation and application of the Combination Rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another, (b) the reasonableness of a practice of routing as between higher and lower-rated routes, and (c) uniformity in the application of rates, which is the paramount purpose of the Commerce Act.

2. Preliminary application to the Commission having been necessary, its decisions must be sustained unless clearly contrary to law.

3. The construction by the Commission should be sustained because it has long been declared and applied and has become a settled administrative construction.

4. The rule that in doubtful cases, in the construction of a tariff, the Court will consider how the rates claimed would operate as a matter of justice, requires that the Commission's construction be sustained.

5. The Commission should be upheld because the tariff provision, here in question, was contemporaneously construed by all interested parties as here construed by the Commission.

6. Any ambiguity or doubt as to the meaning of the tariff in question must be resolved against the carriers.

7. Response to the Defendants' plea that the "Combination Rule" cannot be applied over routes

where such application would result in a violation of the long-and-short haul provision of the Act.

8. The decision of the Circuit Court of Appeals of the District of Columbia, in *B. & O. R. R. Co.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 448, is sound and should be sustained.

9. The cases of *Hohenberg* v. *L. & N.* (C. C. A. 5), 46 Fed. (2d) 952, and *Wheelock, et al.*, v. *Walsh Fire Clay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, relied upon by respondents, are not in point here.

PRELIMINARY RESORT TO THE COMMISSION WAS NOT ONLY PROPER BUT NECESSARY.

That it was proper to make original application to the Commission rather than to the Court is not challenged by the respondents and, of course, cannot be since Section 9 of the Interstate Commerce Act, as amended (U. S. C. A., Title 49, Sec. 9), specifically provides that any person claiming to be damaged by any common carrier, subject to the provisions of the Interstate Commerce Act, may either make complaint to the Commission or bring suit in any District Court of the United States of competent jurisdiction. Respondents take the position, however, that preliminary application to the Commission was not here necessary since, as they contend, the question presented involves no question of fact or law calling for the exercise of administrative functions.

We insist, however, that such questions were involved and that, moreover, the entire situation re-

quired the judgment of a tribunal that was familiar with the historical background which gave rise to the tariff rule in question, with the relation of such tariff rule to other tariffs and the effect of its interpretation upon the closing of routes as well as the necessity of of keeping such routes open.

The Circuit Court of Appeals recognized that resort to the historical setting which gave rise to the rule was necessary to a proper interpretation and application of the rule. It begins its opinion with the statement that the controversy is between shippers of lumber and carriers in respect to the construction of a rule in freight tariffs and that "an understanding of the point in dispute requires exposition of its historical setting" (R. 74). It then proceeds to set forth this historical setting at great length, leaving out of its review thereof, however, two of the most important facts which are (a) that the contemporaneous construction of both shippers and carriers was in accord with the construction of the Commission, and (b) that in 1923 the carriers made application to the Commission for authority to amend the tariff so as to make it read as they now contend it should be interpreted to read, and the Commission refused to permit such an amendment. The fact that "an understanding of the point in dispute requires exposition of its historical setting" in itself is conclusive that the question goes beyond the mere interpretation of the ordinary meaning of words.

Not only was an understanding of the historical setting required, but also an understanding of the result

of adopting the interpretation for which the opposing parties contended. The interpretation for which the carriers contended would result in closing commercially the routes by which the combination rates applied. It is true these routes would still be legally open, but, inasmuch as, in the absence of the application of the Combination Rule in constructing the rates, such rates would be higher than the rates via other routes, these routes would be closed commercially. Both the Commission and this Court have recognized that a route may be legally open and yet commercially closed. In *Western Pacific R. Co.* v. *Northwestern Pacific R. Co., et al.*, 191 I. C. C. 127, the Commission said (130):

> "While complainant's route is legally open and shippers may, under the tariffs, route shipments between Northwestern Pacific points and eastern defined groups over complainant's line, the combination rates effectively bar such movements, and that route may be said to be commercially closed. Although some trans-continental traffic has moved over its line and the route is technically open, it is not in effect a desirable open through route, as its availability is contingent upon the payment of combination rates which exceed the joint rates applicable over other routes from and to the same points. In the final analysis the combination rates effectively prohibit the use of complainant's line as a through route for transcontinental traffic. In *Virginian Ry. Co.* v. *United States, supra,* the Supreme Court distinguishes between a route commercially closed and one legally closed."

In *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 71 L. Ed. 463, cited by the Commission, this Court held that a route was closed commercially, although same was physically open, because there were no through joint rates and the applicable combination of local rates was so high as to be prohibitive. The Court said (660-661):

> "Some of the fifty-four made complaint to the Interstate Commerce Commission that they are denied access to the western markets; and sought relief under both section 1 and section 3 of the Act to Regulate Commerce. For most of these fifty-four mines access to these markets was and is physically possible through a junction of the Virginian and the Chesapeake & Ohio. But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these fifty-four mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

Whether an interpretation should be adopted which would result in the commercial closing of numerous routes which had been long in existence and which would remain open under another permissible interpretation was certainly an administrative question requiring serious consideration by the Commission.

This is so because the right to use other tariff provisions depends upon whether the route of movement may be through a given intermediate point. Among

such other tariff provisions are those providing for stoppage in transit, for grading, drying, surfacing and other treatment and providing for reconsignment in transit. Thus a purchaser of lumber at Laurel, Miss., for shipment to Columbus, Ohio, may wish to stop the shipment at Louisville, Ky., where he has a plant, for drying and other treatment, and the through joint rate may not apply via Louisville, although combination rates, which, treated by the Combination Rule which would not exceed the through joint rate via another route, may be in effect via Louisville. Under the interpretation insisted upon by the carriers this route would be commercially closed although, prior to the general increases which gave rise to the Combination Rule, the route was open and in common use. Such considerations as these are "generally unfamiliar to a judicial tribunal but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages" of transportation. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485, 76 L. Ed. 408, 414.

It will be seen from the foregoing that the interpretation of the rule here involves the consideration of the relation of tariffs one to another. In *Davis, D. G.*, v. *Prairie Pipeline Co.*, 298 Fed. 393, the Circuit Court of Appeals for the Eighth Circuit, said (397):

> "The construction of a freight tariff is a question of law, *Great Northern Ry. Co., et al.*, v. *Merchants Elev. Co.*, 259 U. S. 285, 66 L. Ed. 943. The relation, however, of tariffs one to another in a common territory is not entirely a question

> of law, but more in the nature of a mixed question of law and fact. We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

Another administrative question which, under the authority of *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 62 L. Ed. 1221, could only be determined by the Commission, was whether under all the circumstances the carriers were justified in forwarding unrouted shipments via the route over which the joint rate applied when such rate was higher than the rate via the combination routes with the application of the Combination Rule. In the Solum case this Court had before it the question whether preliminary resort to the Commission was necessary where there was involved the question of the reasonableness of the carriers' practice of shipping over the interstate route between two points, rather than the cheaper intrastate route between the same points. The Court held that this question was one that must be determined by the Commission and that resort should not be had to the Court until such determination by the Commission had been made. The Court said (483):

> "The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is un-

> reasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate (Texas & P. R. Co. v. American Tie and Timber Co., 234 U. S. 138, 147, 59 L. Ed. 1255, 1258, etc.)."

It cannot be denied that this question was presented to the Commission in the case at bar and was squarely decided by it, for, after referring to the decision of this Court in the *Solum Case, supra,* the Commission held (R. 48-49):

> "It should be noted that the Supreme Court held that the reasonableness of the use by a carrier of a more expensive route is an administrative question for this commission to determine. The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. *We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."* (Emphasis ours.)

The necessity for the determination of this administrative question by the Commission would alone require original application to the Commission.

The rule is well established that where questions, such as those above set forth, are presented, prelimi-

nary resort must be had to the Commission. While it is true, as stated in *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 291, 66 L. Ed. 943, 946, that "what construction shall be given to a rail road tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute," yet this is only true where such construction does not involve considerations such as those here presented, which do involve administrative functions and experience in the intricate and technical facts and usages of transportation. The Court was careful to point this out in the *Merchants Elevator Case,* from which we have just quoted, where the Court said (292):

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 50 Fed. (2d) 83, Judge Hand, of the United States Circuit Court of Appeals for the Second Circuit, reviews at great length the decisions of this Court on the question of necessity of application to the Commission in matters arising under the Interstate Commerce Act, and concludes (87):

> "It seems evident that the Supreme Court, after first holding in the Abilene Case, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, that prior resort to the Commission must be had where uniformity of rates is affected by the decision of a question of fact, has proceeded far beyond the natural limitations of such a doctrine, and has, in general, insisted upon prior resort to the Commission wherever complicated questions of fact will arise and experience in technical matters is required."

This Court, in reviewing the judgment of the Circuit Court of Appeals for the Fifth Circuit, stated (*U. S. Navigation Co.* v. *Cunard S. S. Co.*, *supra*, 481):

> "The decisions of this Court which deal with the subject under the Interstate Commerce Act are fully reviewed by the court below in an able and carefully drawn opinion."

That case involved the question whether preliminary resort was necessary to the United States Shipping Board in a proceeding to enjoin an alleged combination of steamship lines in violation of the Sherman Anti-trust Act and the Clayton Act. This Court

affirmed the ruling of the Circuit Court of Appeals, that such preliminary application was required and, after referring to the opinion of the court below as above quoted, this Court also reviewed the "illustrative cases" arising under the Interstate Commerce Act, it being held that the Commerce Act and the Shipping Act should have like interpretation, application and effect. It seems unnecessary to repeat the analysis of the decisions as set forth in the Court's opinion, but it seems clear therefrom that a case presenting the administrative and technical questions here involved, which require an application of knowledge arising from training and experience in the intricate and technical facts and usages of transportation, must be submitted to the Commission for its determination before application to the courts can be had. In fact, as will appear under the next heading, this Court has expressly held, in a similar case involving the construction and application of this same rule, that the question "required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use," and that the determination thereof must be left to the Interstate Commerce Commission. *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 238, 239, 75 L. Ed. 999, 1003.

PRELIMINARY APPLICATION TO THE COMMISSION HAVING BEEN NECESSARY, ITS DECISION MUST BE SUSTAINED UNLESS CLEARLY CONTRARY TO LAW.

It would be a vain thing to require that questions, such as that here presented, be first ruled upon by the Interstate Commerce Commission if its conclusions are not to be final unless contrary to law. Moreover, since the reason for requiring such ruling by the Commission before application to the courts is that the determination involves complicated questions of fact requiring experience in technical matters, it follows that the Court should accept the ruling unless it appears the Commission "acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers" (*Standard Oil Co.* v. *U. S., supra,* 240).

This question has been squarely decided by this Court in the case of *Standard Oil Co.* v. *U. S.,* just quoted from. In that case, as here, the question involved was the construction and application of tariffs. In fact, in reading the opinion of the Commission (139 I. C. C. 297), it appears that in one of the cases, there under review, the question was as to the interpretation and application of the Jones or Combination Rule, here involved. There the shipper had brought a proceeding before the Interstate Commerce Commission to recover reparation on the ground that the rates charged were in excess of the lawfully applicable rates. The Court stated (237):

> "The rates assailed before the Commission were those charged according to what is called the 'Kelley Tariff.' Appellant contended that there were in effect specific rates taking precedence which were lower and should have been applied."

The Commission construed the tariffs upon which the shippers relied as being inapplicable and dismissed the complaints. Thereupon the shippers brought a suit in equity against the Interstate Commerce Commission and the railroads seeking to enjoin and annul the order of the Commission and praying that the Commission be directed by order of the Court to grant the prayer of the complaints and to find that petitioners had been overcharged, as claimed. This Court held that the lower court was without jurisdiction because the order of the Commission was negative both in form and effect. This Court, however, proceeded to consider the second question presented, that is, as to the construction placed upon the tariffs by the Commission and held (238, 239):

> "Second. The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated

> and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. Ed. 1128, 1133, 27 S. Ct. 700. And to that body, in the interest of uniformity, the determination must be left."

This Court, after discussing the principle laid down in *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* which is elsewhere discussed in this brief, then stated (240):

> "There being nothing to suggest that the Commission acted arbitrarily and without evidence to support its conclusions, or that it transcended its constitutional or statutory powers (Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 547, 56 L. Ed. 308, 311, 32 S. Ct. 108), it follows that, apart from what is said in support of the ground first above stated, the order of the Commission was not susceptible to review by the courts. Compare Interstate Commerce Commission v. Delaware L. & W. R. Co., 220 U. S. 235, 251, 55 L. Ed. 448, 456, 31 S. Ct. 392; United States v. Louisville & N. R. Co., 235 U. S. 314, 320, 59 L. Ed. 245, 250, 35 S. Ct. 113; East Tennessee V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 27, 45 L. Ed. 719, 729, 21 S. Ct. 516."

As already stated, one of the cases there under review involved the construction and application of the Combination Rule, here at issue. That rule was incorporated in the tariffs of only one of the participating

carriers and although the Commission had held, in *Sligo Iron Store Co.* v. *W. M. Ry. Co.*, 62 I. C. C. 643, 73 I. C. C. 551, that the rule should be applied when incorporated in the tariffs of one railroad, party to the transaction, it here held that since application of the rule would result in absorption of a greater amount by the carrier incorporating the rule than the revenue it received from the transportation, the rule must be held inapplicable. It was this ruling of the Commission that this Court said was not subject to review by the courts because "both cases concern unusually complicated and technical tariff situations, the proper determination of which called for the exercise of the trained judgment of that body of experts 'appointed by law and informed by experience' " (239).

It is respectfully submitted that application of the doctrine of *Standard Oil Co.* v. *U. S.*, *supra,* is conclusive of this cause because under that doctrine, preliminary resort to the Commission was necessary and the conclusion of the Commission is not subject to review since it is not claimed that the Commission acted arbitrarily, or without evidence, or exceeded its constitutional or statutory powers.

THE CONSTRUCTION BY THE COMMISSION SHOULD BE SUSTAINED BECAUSE IT HAS LONG BEEN DECLARED AND APPLIED AND HAS BECOME A SETTLED ADMINISTRATIVE CONSTRUCTION.

The construction by the Commission was first made in 1923 in *Cancellation Rule for Constructing Combination Rates on Lumber Between Southern Points and Ohio and Mississippi Crossings,* 81 I. C. C. 745, where the Commission not only construed the rule as in the case at bar, but declined to permit the carriers to insert the words which they now insist should be read into the rule. This ruling has been consistently followed by the Commission since 1923 and the following are some of the cases where the Commission has so ruled:

Cancellation Rule for Combination Rates, 93 I. C. C. 614;
M'Gowin-Foshee Lumber Co. v. *A. F. & G. Ry. Co.,* 59 I. C. C. 451;
Moore Marshall Lumber Co. v. *N. O. & N. E. R. R.,* 112 I. C. C. 33;
Gunther & Co. v. *L. & N. R. R.,* 112 I. C. C. 387;
Eiler Lumber Co. v. *M. P.,* 161 I. C. C. 415;
Brabston v. *L. & N.,* 176 I. C .C. 421;
Milne Lumber Co. v. *N. Y. C.,* 152 I. C. C. 65;
Held v. *C. C. C. & St. L. Ry.,* 161 I. C. C. 413;
Domestic Hardwoods, Inc. v. *B. & O.,* 168 I. C. C. 753.

The last-named decision of the Commission was upheld by the Circuit Court of Appeals for the District of Columbia, in *B. & O.* v. *Domestic Hardwoods, Inc.,* 65 Fed. (2d) 488, and review was denied by this Court.

It is settled law that an administrative ruling giving a practical interpretation of an ambiguous or doubtful statute will not be disturbed except for the most cogent and weighty reasons where, as here, the ruling has been long adhered to. This principle was declared by this Court in *Logan* v. *Davis,* 233 U. S. 613, 58 L. Ed. 1121, where it said (627):

> "The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute, by the executive department charged with its administration, is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons."

The same rule was declared by this Court in the earlier case of *Brewster* v. *Gage,* 280 U. S. 327, 74 L. Ed. 457, the Court saying (336):

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

In that case the Court referred to the fact that a reversal of such construction "would be likely to produce inconvenience and result in inequality." It is evident that a reversal of the long-established administrative construction, here involved, would likewise produce inconvenience and result in inequality, thereby destroying the uniformity which this Court has said

"is the paramount purpose of the Commerce Act," for here it appears that during the period when the shipments here involved moved, many of the railroads were adhering to the construction placed upon the tariff by the Commission and that in other instances, where they failed so to do, the Commission required restitution. Even as to many of the shipments originally involved in this proceeding restitution has been made. To here depart from the construction so long and so generally applied would create discrimination, not only between shippers but also between carriers.

It is therefore submitted that the settled rule that an administrative construction, long adhered to, will not be disturbed except for the most cogent and weighty reasons has application here and requires that the construction of the Commission be sustained.

THE RULE THAT IN DOUBTFUL CASES, IN THE CONSTRUCTION OF A TARIFF, THE COURT WILL CONSIDER HOW THE RATES CLAIMED WOULD OPERATE AS A MATTER OF JUSTICE REQUIRES THAT THE COMMISSION'S CONSTRUCTION BE SUSTAINED.

In many cases the courts have held that, in construing an ambiguous tariff provision, a court is justified in considering how the rates claimed would operate as a matter of justice. *Davis, D. G.,* v. *Prairie Pipeline Co.* (C. C. A. 8), 298 Fed. 393, 397; *Pillsbury Flour Mills Co.* v. *Great Northern R. Co.* (C. C. A. 8), 25 Fed. (2d) 66, 68, 69; *Hohenberg* v. *Louisville & Nashville R. Co.* (C. C. A. 5), 46 Fed. (2d) 952, 955; *Whee-*

lock, et al., v. *Walsh Fire Clay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, 418.

Applying this rule here, it is clear that the construction made by the Commission should be sustained. Under that construction the carriers would receive the increases as authorized and the shipper would not only pay no more but could continue to use the combination routes as in the past. Under the construction for which the carriers contend, if the shipper used the combination routes he would, in many instances, pay double increases and if he shipped by the route via which the through rate applied he would be deprived of the use of routes which all agree are reasonable routes. These considerations had great weight with the Commission as may be seen by reading the decisions (81 I. C. C. 745, 93 I. C. C. 614) in which it declined to permit the carriers to amend the tariff to include the words "via any route." We have already pointed out that to now adopt the construction for which the carriers contend would result in discrimination not only as between shippers but as between carriers.

It is therefore respectfully submitted that if the Court applies the rule that consideration should be given to how the tariff would operate as a matter of justice, the construction by the Commission must be sustained.

THE COMMISSION SHOULD BE UPHELD BECAUSE THE TARIFF PROVISION, HERE IN QUESTION, WAS CONTEMPORANEOUSLY CONSTRUED BY ALL INTERESTED PARTIES AS HERE CONSTRUED BY THE COMMISSION.

In the amendment to the petition herein, it is alleged as follows (R. 39):

> "For several years after 1920 the railroads applied the aforesaid 'Combination Rule' to shipments of lumber from the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 745 and 93 I. C. C. 614."

On demurrer this allegation must, of course, be taken as true. Moreover, when the carriers undertook to amend the tariffs by inserting the words "via any route" and contended that the amendment to the tariff was merely to clarify the tariff and make certain that which the tariff already provided when properly construed, the Commission, in declining to permit the amendment, said:

> "It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that

> their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. *The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.*" *Cancellation Rule for Combination Rates,* 81 I. C. C. 745, 746. (Italics ours.)

It will be noted that the Commission here states that "both the carriers and shippers have in the past put a different construction on the application of this Combination Rule," that is, a construction different from that for which the amended tariffs provided, which was to confine the application of the rule to cases where there was no through joint rate *via any route.*

Later, in the same opinion, the Commission reiterated the statement as to the contemporaneous construction in the following language (748):

> "Protestants further maintain that the language of the rule in the Jones tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there is a joint through rate in effect over the route of movement. This, in our opinion, has been the generally accepted interpretation of the rule, and much traffic has moved over the so-called unau-

> thorized routes under this interpretation since the inception of the rule."

It will be noted that the Commission not only points out that the generally accepted interpretation of the rule has been that rates constructed thereunder are invariably applicable unless there is a joint through rate in effect over the route of movement, but also shows that much traffic had moved over the combination routes under this interpretation since the inception of the rule.

It therefore appears that the contemporaneous construction of all interested parties was in accord with the construction here made by the Commission, and for which we contend. It is necessary to cite only a few cases showing the weight to be given to the contemporaneous construction of documents by the parties thereto.

In *Union Wire Rope Corp.* v. *A. T. & S. F. Ry. Co.*, 66 Fed. (2d) 965, it is recognized that a promulgated tariff partakes of the nature of a contract; and, as pointed out in *Updike Grain Co.* v. *C. & N. W. Ry.*, 35 Fed. (2d) 486:

> "While there may be some rules of construction peculiarly applicable to a railroad tariff, yet ordinarily the rules governing the construction of other documents have been applied by the courts to such tariffs" (487).

The universal rule as to the weight of contemporaneous construction of ambiguous documents was stated

by this Court in *District of Columbia* v. *Gallaher,* 124 U. S. 505, 31 L. Ed. 526, as follows:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

And in *Michigan Home Colony* v. *Tabor,* 141 Fed. 332:

> "These facts, without more, show that the parties construed the covenants of their contract to be mutual and dependent. If the literal meaning of the covenants in question were in doubt, the practical construction which was put upon them by the parties must prevail" (337).

And in *Manhattan Life Insurance Co.* v. *Wright,* 126 Fed. 82:

> "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors" (87).

ANY AMBIGUITY OR DOUBT AS TO THE MEANING OF THE TARIFF IN QUESTION MUST BE RESOLVED AGAINST THE CARRIERS.

Tariffs are, of course, written by the carriers. The general rule that in construing written instruments all ambiguities or reasonable doubts as to their meaning is to be resolved against the maker of the instrument, has particular application to railroad tariffs. In *Union Wire Rope Corp.* v. *A. T. & S. F. Ry. Co.*, C. C. A. 8th Circuit, *supra,* the Court stated the rule and gave the reasons therefor, as follows:

> "A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects, the only contract between the two allowed by law. Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. Not only is this simply an application of the general rule as to construction of written contracts and instruments, but, when the place occupied by transportation and the situation of shippers are considered, it is particularly useful in application to tariffs" (966, 967).

In *United States* v. *Gulf Refining Co.,* 268 U. S. 543, 69 L. Ed. 1082, this Court applied the rule for con-

struing ambiguous tariffs against the railroad and stated "where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates" (547).

In *Atlantic Coast Line Co.* v. *Atlantic Bridge Co.*, 57 Fed. (2d) 654, the Circuit Court of Appeals for the Fifth Circuit, stated the rule in the following forceful language:

> "The Commission and the District Judge took the broader view of the reference. We think they were right. Tariffs, like statutes, have the force of law; like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. Swift v. U. S. (C. C. A.), 255 F. 291. They may not be contrived in catch-penny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. Southern Pac. v. Lothrop (C. C. A.), 15 F. (2d) 486; American Ry. Express Co. v. Price Bros. (C. C. A.), 54 F. (2d) 67; United States v. Gulf Refining Co., 268 U. S. 543, 45 S. Ct. 597, 69 L. Ed. 1082. That the articles in question here consist of machinery, which, though not classified as such under Southern classification, item 'Machinery and Machines,' were by that classification rated sixth class, and therefore come under the general terms of reference used in the exception, unless they can be specifically limited as the carrier contends, is perfectly clear; in fact, no one denies it. It is equally clear that a carrier may not, under a tariff couched

> in general terms, which, if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune" (655, 656).

While carriers do not question the validity of this rule, yet they urge that there is no ambiguity or uncertainty as to the meaning of the tariff provision here in question, and the courts below concurred in this view. This view is clearly untenable when the facts of this case are considered. As shown by the Commission's original decision in this case, which is filed as a part of the amended petition herein, the carriers admit (R. 47) that the "published through rate" must apply over the line of the initial carrier of the route used, and they thereby admit that something in addition to the words used must be read into the tariff. Not only this, but when the carriers applied to the Commission for permission to amend the tariff in question by adding the words "via any route" they thereby admitted that the tariff, as written, was ambiguous, and it was necessary to clarify its meaning.

Petitioners have likewise insisted that there is no ambiguity in the tariff rule in question and that it plainly means just what the Interstate Commerce Commission has construed it to mean. This contention is predicated upon the usage of applying rates to the movement involved and construing all tariff rates as having application to the service performed

rather than to some other service. It finds support in the contemporaneous construction of both shippers and carriers. Commissioner Woodlock based his reluctant concurrence in the original opinion of the Commission herein, in 142 I. C. C. 521, upon the fact that there was no real ambiguity and the rule plainly must be applied to the route of movement. In this connection he said (R. 51):

> "There is no real ambiguity in the tariffs (notwithstanding reference thereto in the report) and the tariffs have the effect of law. We have no option in the matter. For that reason I am compelled to accept this report."

However, that there is ambiguity would seem to be established by the history of the litigation arising out of the application of the rule and by the fact that two Circuit Courts of Appeal have reached diametrically opposite conclusions as to the proper construction thereof.

If there be ambiguity we submit that established rules of construction require that the ambiguity be resolved against the makers of the tariff.

RESPONSE TO THE DEFENDANTS' PLEA THAT THE "COMBINATION RULE" CANNOT BE APPLIED OVER ROUTES WHERE SUCH APPLICATION WOULD RESULT IN A VIOLATION OF THE LONG-AND-SHORT HAUL PROVISION OF THE ACT.

By amended answer (R. 60-61) the defendants pled that in some instances the application of the Combination Rule would result in a violation of the 4th Section of the Interstate Commerce Act, as amended, known as the "long-and-short provision," which prohibits the charging of a greater sum for shorter than for a longer distance over the same line or route (U. S. C. A. Title 49, Section 4). This contention was earnestly pressed in both the District Court and the Circuit Court of Appeals, and great reliance was placed on the case of *Great Northern R. R. Co.* v. *Delmar,* 283 U. S. 686, 75 L. Ed. 1349, but neither of the courts below based their decision on this plea or even referred to it. It is not claimed that such violation of the 4th Section would result here as to most of the shipments involved and only two illustrations of such result were pled. The contention is, however, that because the application of the rule, as construed by the Commission, would result in some instances in violation of the 4th Section that no such construction is lawful in any instance.

In the *Delmar Case, supra,* the question was as to the route over which a through joint rate applied which was published without naming or restricting any routes, one of the possible routes involving a violation

of the 4th Section of the Act and the other being free from such violation.

This Court held that under these circumstances the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of the law should be applied, and that the tariff should be construed as applying only to the shorter route as to which there was no violation. Here it is admitted that the combination routes are direct reasonable routes. The combination rates are composed of separate specific rates which it is assumed do not individually violate the 4th Section. If the application of the Combination Rule results in 4th Section violations in cases where there is a joint through rate from the same point of origin, it would necessarily result in a like violation in instances where there is no joint through rate from the point of origin, in which instance the carriers admit the Combination Rule applies. Thus the contention of the carriers would destroy the rule in its entirety and there would be nothing left to construe. However, even should the Court conclude that the rule should not be applied in any instance where it would result in a violation of the 4th Section and that the shippers so situated must suffer the double increases, this would be no reason for failure to apply the rule in those instances where no such violation does result.

In *Chicago Great Western Railroad* v. *Farmers Shipping Ass'n,* 59 Fed. (2d) 657, a situation was presented where either construction of the tariff would

result in violations of the 4th Section, just as is the case here, and the Court stated:

> "Counsel for the Association also urges that to adopt the construction contended for by the Railroad Company will result in a violation of the long and short haul provisions of section 4 of the Interstate Commerce Act (24 Stat. 379, 380, sec. 4, as amended by 36 Stat. 539, 547, sec. 8, and 41 Stat. 456, 480, sec. 406 (49 U. S. C. A. sec. 4)). This argument is of little force because either construction will result in a violation. It will be noted that in Item 735-A, Lindwerm is nearer to the Missouri River points than is Granville, and the rate to Lindwerm is 23.5 and the rate to Granville is 16. The tariff on its face violates section 4 and to construe it to apply to stations intermediate to the Missouri River points and the points in the group north and west of Chicago will simply increase that violation". (659, 660).

In the case of *Beaumont, Sour Lake & Western* v. *Magnolia Provision Co.*, 26 Fed. (2d) 72, the question as to whether the fact that the published rate violated the 4th Section rendered the rate invalid, was squarely presented, and the Court held that the published rate must be assessed notwithstanding such violation. There the carrier had published a rate of 23 cents per 100 pounds on tin cans from New Orleans to Houston, Texas. The rate was published by mistake as the carriers had intended to continue in force the pre-existing rate of 70 cents. The 70-cent rate was collected and the shipper sued to recover to the basis of the published

rate of 23 cents. The carriers defended both on the ground of mistake and on the ground that the 23-cent rate violated the long-and-short-haul clause of the Interstate Commerce Act, because it was less than the rate to intermediate points over the same route, and the Court said (73):

> "In Lamb-Fish Lumber Co. v. Y. & M. V. R. R. Co., 42 I. C. C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in Davis v. Portland Seed Co., 264 U. S. 403, 424, 44 S. Ct. 380, 68 L. Ed. 762. The carriers cannot defend by showing that published rates, if enforced, would violate the long and short haul clause and subject them to penalties. Such a showing would only be evidence of intention indicating that a mistake was made. Because of the policy of the law, the rate must be abided by as long as it is included in published schedules of rates. The remedy of the carriers is to apply to the Interstate Commerce Commission to have the rate changed. The judgments are affirmed."

The rule as construed by the carriers, however, would we believe, be clearly unlawful because of the violation of Section 6 of the Interstate Commerce Act as amended (U. S. C. A., Title 49, Section 6), Section 1 of which provides as follows:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. The provi-

sions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

The Commission, in *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi River Crossings,* 93 I. C. C. 614 (the case where the defendants tried to add the words "via any route" to the Combination Rule), held that the rule, so worded, would violate this section, saying (615):

> "Another serious objection to the tariff provision proposed is that it does not fully conform to the requirements of section 6 of the interstate commerce act in that the restriction proposed makes necessary a search of other tariffs in order to determine whether there are joint rates over any route before it can be determined whether the rule is applicable."

It thus appears that while the rule, as construed by the Commission, might in some instances result in 4th Section violations, just as it would if construed as contended by the carriers, yet in all instances the latter construction would result in violation of Section 6. Under these circumstances we submit the fact that the construction made by the Commission may result, in some instances, in a violation of Section 4 is no reason for rejecting that construction and substituting a construction which would result in violation of both Section 4 and Section 6.

THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, IN *B. & O. R. R. CO.* v. *DOMESTIC HARDWOODS, INC.*, 65 FED. (2d) 488, IS SOUND AND SHOULD BE SUSTAINED.

The question involved in this case was passed upon by the Circuit Court of Appeals of the District of Columbia, in *B. & O. R. R. Co.* v. *Domestic Hardwoods, Inc., supra,* and the construction made by the Commission was sustained. The direct conflict between that decision and the decision of the Circuit Court of Appeals for the Sixth Circuit herein was the principal ground urged in the application for the writ of certiorari here. We think the reasoning of the Circuit Court of Appeals for the District of Columbia is unanswerable and quote therefrom, as follows (491, 492):

> "It is admitted here that, if the Jones rule does apply, there was an overcharge. It is equally admitted that, if the proviso that the rule should not apply where there is a joint rate is applicable, there is no overcharge. The single question in this aspect of the case, therefore, is whether the construction of the language of the proviso by the Commission is correct. The position that the carriers take is that the Jones rule is applicable only where there is no joint through rate via any route. This the Commission held was not the correct interpretation, and we find ourselves in agreement with this conclusion, though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would pre-

sent more difficulty, for the language is undoubtedly broad enough to be construed as contended by carriers. *But it should be remembered that the question involves more than the mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court. But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural.*" (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit, in reaching a contrary conclusion, stated that it was "unable to follow the reasoning of the District Court of Appeals of the District of Columbia to its conclusion" (97). In rejecting the reasoning of the Circuit Court of Appeals of the District of Columbia, the Court below stated (97):

> "Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigency requires."

From this it appears that the Court below based its decision, in part at least, upon the conclusion that there was no inherent technical question involved since elsewhere the Court states (95):

> "The first question to be determined is the conclusiveness of the Commission's awards. If the question were one of fact, or involved the exercise of administrative discretion, we are bound by the decision. The Commission, however, was asked to construe a railroad freight tariff. No question was before it as to the reasonableness of rates, and while existence of through routes was involved, there was no controversy as to the fact, and no question decided as to the reasonableness of the routes. The question was one of law, and while great deference will be paid to the Commission's conclusions, we are not bound by them. Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 99; U. S. v. Missouri Pacific R. Co., 278 U. S. 269, 280. The problem of ascertaining the proper interpretation to be given to a tariff provision is akin to that to be given any other document. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291."

From a comparison of the two opinions it fairly appears that the difference in the conclusions reached arises principally from the fact that the Circuit Court of Appeals of the District of Columbia concluded that the "question involves more than a mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a

technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court," while the Court below held that no technical question or question of fact was involved and that the question was solely one of law as to the meaning of words. We have undertaken to demonstrate that the question here was one requiring action by the Commission since it presented administrative and technical questions involving rates and routings, the relation of tariffs one to another, which necessitate the application of knowledge arising from training and experience in the intricate and technical facts and usages of transportation. But aside from this question the two Courts are in sharp disagreement in their own interpretation of the tariff. The Circuit Court of Appeals for the District of Columbia, after referring to the weight to be given to the Commission's construction, states:

> "But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural" (492).

On the other hand, the Court below held that there was no ambiguity in the rule and no occasion for construction; that it was so clear that neither the practical construction of the parties, nor the construction of the Commission, nor the historical background which gave rise to the rule could be permitted to defeat its plain meaning as found by the Court. This notwithstanding

the long controversy over the proper construction and the fact that both the Commission and another United States Circuit Court of Appeals had ruled to the contrary.

THE CASES OF *HOHENBERG* v. *L. & N.* (C. C. A, 5), 46 FED. (2d) 952, AND *WHEELOCK, ET AL.*, v. *WALSH FIRE CLAY PRODUCTS CO.* (C. C. A. 8), 60 FED. (2d) 415, RELIED UPON BY RESPONDENTS, ARE NOT IN POINT HERE.

In respondents' brief in opposition to the granting of the writ herein, reliance is had upon the above-styled cases, and it is stated that "these two decisions show that the decision of the Circuit Court of Appeals in the case at bar is right and the decision of the Court of Appeals of the District of Columbia is wrong."

An examination of these cases will show that they have no bearing whatever upon the issue here. True, they involve the application of the Combination Rule, but in a wholly different situation than here presented. In each of these cases only the tariff of the initial carrier incorporated the Combination Rule by reference. Here it is admitted that the rule was incorporated in tariffs of all the carriers. The question there was whether the incorporation of the rule by one carrier was sufficient to make the rule applicable to the entire movement where it was not a part of the tariff of connecting carriers, parties to the movement. This was clearly a question of law involving no question of fact or administrative policy. The Commission held that

the initial carrier, having incorporated the rule in its tariff, should protect same on the through movement. In each case, however, the Court held that whether the rule applied by carriers whose tariff did not include the rule, was a question of law and as such must be decided in the negative. In the *Wheelock case, supra,* the Court pointed out that the rule could not be made applicable to a carrier whose tariffs did not include it and that to put the entire burden upon the initial carrier of protecting the rate resulting from application of the rule, would work injustice, the Court saying (418):

> "As said by this court in Davis v. Prairie Pipeline Co., 298 F. 393, 397, '* * * A court is warranted in considering how the rates claimed as applicable would operate as a matter of justice in getting at the railroad's intention with relation to the tariffs.'
>
> "It would seem clear that the Jones' combination rule was not intended to be applied unless all factors of the combination were subject to that tariff. In the instant case, where only the initial factor was subject to the rule, the other participating carriers are entitled and required to charge and collect their tariff rates unaffected by the rule, and this would place the entire reduction upon the initial carrier because the other carriers did not participate in the infliction of any wrong and are not joint tort-feasors. The effect of the judgment here was to reduce, in instances where the rate was made of two factors, the $1.65 rate from Vandalia, Mo., to Evansville, Ind., as speci-

> fied in Speiden's Tariff, to $1.15, and, in the event the rate is made up of three factors, this $1.65 rate is reduced to 65 cents. It would therefore result that the initial carrier in this case would collect and receive neither the rate named in the Speiden Tariff, nor that rate as modified by the Jones Tariff. In other words, it would collect a rate justified by no published tariff."

It will thus be seen that these cases are in no way in point here except as they declare the rule that the Court is warranted in considering how the rates claimed as applicable would operate as a matter of justice.

CONCLUSION.

It is submitted that the Interstate Commerce Commission had exclusive jurisdiction of this cause to determine the construction and application of the tariff in question, and that its determination is not subject to review since it is not claimed that the Commission acted arbitrarily, or without evidence, or exceeded its constitutional or statutory powers, and that the case of *Standard Oil Co.* v. *U. S., supra,* is conclusive of this case.

It is further submitted that aside from the conclusive character of the Commission's determination, for all of the foregoing reasons the tariff was correctly construed by the Commission.

It is therefore respectfully urged that the finding of the Interstate Commerce Commission be upheld; that the decree of the Circuit Court of Appeals for the

Sixth Circuit be reversed, and the case be remanded with directions that the demurrer to the petition, as amended, be overruled, and the demurrer to the answer, as amended, be sustained.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at:
Louisville, Ky.,
November 23, 1936.

APPENDIX.

STATUTES RELIED ON.

Sec. 16. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, February 28, 1920, June 7, 1924, and August 9, 1935*) (*U. S. Code, title 49, sec. 16.*) (1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Sec. 9. (*As amended August 9, 1935.*) (*U. S. Code, title 49, sec. 9.*) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 4. (*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*) (*U. S. Code, title 49, sec. 4.*) (1) That it shall be unlawful for any common carrier subject to the provisions of this part to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, but this shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensa-

tion for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a mort direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this mandatory part by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

Sec. 6. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*) (*U. S. Code, title 49, sec. 6.*) (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its

own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation; in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL., - - - - - - - Respondents.

MEMORANDUM REPLY FOR PETITIONERS.

J. V. NORMAN,
Counsel for Petitioners.

Dated at:
Louisville, Ky.,
November 23, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD CO.,
ET AL., - - - - - - - - *Respondents.*

MEMORANDUM REPLY FOR PETITIONERS.

At the time of the preparation of our original brief we had not seen the brief of respondents. Having now received same we feel it necessary to make brief response to certain statements contained therein, particularly as to matters considered by the Interstate Commerce Commission.

The statement is made, at page 17, that "petitioners here are simply trying to make the case they made before the Commission into a different case in this Court," and it is said, over and over again, that there was no question before the Commission involving the reasonableness of rates, nor any question respecting the reasonableness of routes (See page 3—also page 10).

It is also urged that if petitioners desired to raise the question of routes they should have applied to the Commission for the exercise of its power under paragraph 3, of Section 15, of the Interstate Commerce Act, to establish through routes (p. 14).

It is true that petitioners did not claim that the through joint rates via the routes by which they apply were unreasonable; nor did they claim that the routes via which said rates applied were unreasonable. Their claim was that the routes via which the combination rates applied were reasonable routes, already established, and that the construction and application of the tariffs, for which the carriers contended, would result in the commercial closing of those routes by increasing the rates applicable thereby.

Prior to the institution of proceedings by these petitioners, the carriers had sought to amend their tariffs so as to make the Combination Rule applicable only where there was no joint rate via any route and the Commission had declined to permit such amendment (R. 39). Among other reasons which the Commission gave for its refusal to permit the amendment, was the fact that such amendment would serve to increase the rates via the combination routes and that such increases had not been justified.

In view of the oft-repeated statement in respondents' brief, that there was no administrative question involved before the Commission and no question of rates or routing, it becomes necessary to quote from the Commission's reports. The following extracts from the Commission's original report in the proceeding

brought by petitioners, 142 I. C. C. 521 (R. 40), will serve to show the issues involved and the questions considered:

> "These complaints, filed on various dates from April 11, 1925, to January 21, 1926, are brought on behalf of numerous individuals, partnerships, and corporations, engaged in the manufacture and sale of lumber and other forest products. Collectively they bring in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac Rivers and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in central territory. Certain of the shipments are also alleged to have been misrouted.
>
> * * * * * * *
>
> "* * * The issues presented are whether the joint rates applied over all the routes, and, if not, whether the applicable rates over the routes over which the joint rates did not apply were the lowest full combinations of separately established factors by such routes, or the lowest rates resulting from the application of the combination rule to such factors.
>
> * * * * * * *
>
> "Included in the above are certain shipments which were reconsigned in transit. Such shipments are through shipments and, under the tariffs here considered, were subject to the same

transportation rates as were applicable on other through shipments.

"Specific routings were shown in connection with the joint rates. In addition, some of the tariffs contained the following note:

"The routing shown is that ordinarily and customarily used, and should be strictly observed by agents. If, from any cause, shipments are routed by carriers via other junction points but over the lines of carriers parties to this tariff, rates published herein will apply.

* * * * * * *

"Defendants contend that the preferred routing clause gave the carriers the privilege of using any route embracing the lines of carriers parties to the tariffs, and applying the joint rates. For example, they contend that the legal rate from Laurel, Miss., to Columbus, Ohio, over the Gulf, Mobile & Northern to Ackerman, Miss., and the Illinois Central and its connections beyond was the joint rate of 43 cents. No joint rate was provided for specific application over this route, but the carriers embraced in this route were all parties to the joint-rate tariff, which carried the preferred-routing clause. Complainants claim a rate of 40.5 cents, which is the combination rate produced by the combination rule.

* * * * * * *

"* * * Defendants' position with respect to the preferred-routing clause is untenable.*

"We have uniformly held, in cases where tariff situations similar to those here considered were

*The contention by the carriers that they had the right, under the Preferred Routing Clause, to apply the joint rate via all routes, which was presented to and decided by the Commission, has been abandoned by the carriers.

presented, that the combination rule is applicable in the absence of a joint rate over the route traversed regardless of the fact that joint rates were applicable over other routes. Cancellation Rule for Combination Rates, 93 I. C. C. 614; M'Gowin-Foshee Lumber Co. v. A. F. & G. Ry. Co., 95 I. C. C. 451; Moore Marshall Lumber Co. v. N. O. & N. E. R. R. Co., 112 I. C. C. 33; Gunther & Co. v. L. & N. R. R. Co., 112 I. C. C. 387. The arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holdings on this question.

* * * * * * *

"* * * We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."

It will be noted that the Commission, in overruling the contention of the carriers, refers to its previous decisions construing and applying the Combination Rule, and states that while it has carefully considered the defendants' contentions here, it finds nothing therein which warrants a reversal of its previous holdings on the question. The Commission did not restate the reasons for its previous ruling and it therefore becomes necessary to examine the previous reports, referred to, in order to ascertain all of the grounds upon which the Commission bases its ruling. It will only be necessary, however, to refer to the reports in which the Commission rejected the applica-

tion of the carriers to amend the rule by inserting the words "via any route," so as to restrict the application in the manner that the respondents here urged. The original report, by Division 3 of the Commission, on this application, is found in 81 Interstate Commerce Commission reports, page 745, and we call the Court's attention to the following extracts therefrom:

> "By schedules filed to become effective April 28, 1923, and later dates, respondents propose to restrict the application of the so-called combination rule for constructing lumber rates from the Mississippi Valley and southeastern points of origin to Ohio and Mississippi River crossings when the shipments are destined for points beyond these crossings.
>
> * * * * * * *
>
> "The rule for constructing combination rates, the application of which respondents seek to restrict, is published in Agent Jones' tariff I. C. C. U. S. 1. They propose to confine its application to movements from origin to destination points where there are no through rates in effect via any route. The rule originated with the Director General of Railroads and was originally published in compliance with freight-rate authority No. 10. It provided for the application of single increases to the combination rates where no through rates were in effect from point of origin to destination. The application of this rule has in many instances resulted in lower rates than were applicable under the published through rates. It has been and is possible under the rule to divert shipments at

points and over routes that were not available before its publication.

* * * * * * *

"It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.

"Respondents assert that if the Jones rule for constructing combinations is employed where there is a through rate in effect via any route, they will be deprived of the advances allowed them under General Order No. 28 and the general increases of 1920. They urge with force that the carriers are entitled to these advances, but General Order No. 28 and the general increases of 1920 did no more than allow increases on the traffic hauled. *Neither was intended to control routing.**

* * * * * * *

"It is urged by respondents that if these suspended items be allowed to become effective they will clarify the situation, prevent confusion, preserve the revenue of the carriers, and result in no

*Italics are ours throughout.

increase in rates or inconvenience to the shipper. Exhibits offered by protestants show many instances in which *increases* would result.

* * * * * * *

"Protestants further maintain that the language of the rule in the Jones tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there is a joint through rate in effect over the route of movement. *This, in our opinion, has been the generally accepted interpretation of the rule, and much traffic has moved over the so-called unauthorized routes under this interpretation since the inception of the rule.*"

The carriers moved the Commission for reconsideration by the entire Commission, which was granted, and the case reargued before the entire Commission. The report of the Commission, on such reargument, is found in 93 Interstate Commerce Commission reports, page 614, and we call the Court's attention to the following extracts from this report:

"Respondents on reargument present no new facts and have done little more than restate and emphasize the contentions and arguments contained in their original brief. It clearly appeared from the evidence introduced by protestants that the schedules proposed by respondents would in many instances result in *increased* lumber rates over so-called unauthorized routes, *and that there were both actual and potential movements over some of these routes. Respondents made no attempt either at the hearing or on reargument to justify these increased rates.* They apparently

rely largely upon an interpretation of the combination rule, with which we can not agree, to justify the restriction to the rule which they propose.

* * * * * * *

"* * * We affirm our original finding that a tariff provision such as was proposed and suspended would have the effect of *increasing* the lumber rates from the Mississippi Valley and southern points of origin to Ohio and Mississippi River crossings and that *respondents have not justified these increased rates.*

* * * * * * *

"* * * But, as we have pointed out, the record shows that if the proposed schedules had been allowed to become effective, certain of the rates involved would *have been increased.* We have found in a number of cases that the mere desire to eliminate the combination rule is not a justification *for increased rates.*"

It will be seen from the foregoing quotations that the Commission declined to permit the carriers to amend the tariffs so as to restrict the application of the Jones Rule, as they here assert it is restricted, and that in reaching its decision that the rule applied to route of shipment the Commission considered various questions that were peculiarly and exclusively within its province. Among such questions were the following:

(a) The restriction of the routes by increasing the rates over certain routes so as to commercially close such routes.

(b) Restricting the right to divert shipments.

(c) The matter of increasing rates by the combination routes, which the Commission held the carriers had not justified.

(d) The question as to whether the so-called "preferred routing clause" in the tariffs made the joint rates applicable via routes not specified in connection with such rates.

(e) Assuming the application of the Combination Rule, whether the carriers were nevertheless justified in using the routes over which the higher rates were applicable.

It is true the Commission did not repeat all of these considerations in its report in the case at bar, but it based its conclusions on these previous rulings by reference to such rulings and by the statement that "the arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holding on this question."

It is therefore submitted that a review of the opinions of the Commission establish that its determination of the question involved required administrative action and the consideration of the matter of the justification for increasing rates by the routes via which the combination rates applied and the propriety of commercially closing such routes.

THE STATEMENT IN RESPONDENTS' BRIEF, THAT THE PURPOSE OF THE RULE WAS TO PROTECT SHIPPERS WHO WERE SHIPPING FROM POINTS WHERE NO THROUGH RATES WERE IN EFFECT (pp. 6 and 43), IS NOT CORRECT.

This statement is made without qualification and it is the basis for the argument that the Interstate Commerce Commission and the petitioners are undertaking to have the rule applied to accomplish a purpose for which it was never intended. There is no basis for such a statement except the assumption of the pleader. The Interstate Commerce Commission stated that the purpose of the rule was "to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts" (R. 45).

The Commission further stated that the increases granted were to apply "on the traffic hauled" and were not "intended to control routing." If the carriers' contention here is sustained, the result will be that carriers would control routing by confining the movement to the routes specified in connection with the joint rates. In view of these findings of the Commission it cannot be said that the sole purpose was to protect shippers who were shipping from points from which no published through rates were in effect.

THE RESPONDENTS' STATEMENT THAT THE COMBINATION RULE IS UNAMBIGUOUS IS CONTRADICTED BY RESPONDENTS' ACTION.

On page 24 of respondents' brief, it is stated that "there is no ambiguity in the language, * * * it does not give rise to any reasonable doubt. The language is just as clear as a bell and means just what it says and says just what it means." We desire to call the Court's attention to the fact that the record shows that prior to 1923 respondents, as well as other carriers, and the shippers construed the rule to apply as here contended by petitioner. It further shows that in 1923 the respondents attempted to amend the rule by inserting the words "via any route," so as to make it read as respondents now claim it should be interpreted to read. If "the language is just as clear as a bell" it certainly could not be made clearer. It is therefore submitted that the actions of respondents estop them from now claiming that there is no ambiguity in the rule.

CONCLUSION.

We will not undertake to argue any of the legal questions involved but we feel justified in asking permission to file this brief reply to certain statements made in respondents' brief.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
November 23, 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 100

W. P. BROWN & SONS LUMBER COMPANY, ET AL.,
Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT

A concise and accurate statement of this case is found in the opinions below of the Circuit Court of Appeals for the Sixth Circuit, 82 Fed. (2d) 94 (R. 124), and of the District Court, 7 Fed. Supp. 593 (R. 111). The decisions of the Interstate Commerce Commission in the case at bar are reported under the title *Wausau Southern Lumber Co., et al.*, v. *Alabama Great Southern Railroad Company, et al.*, 142 I. C. C. 521 (R. 87), 182 I. C. C. 731 (R. 15).

The question presented by the case was solely one of law: the proper construction of a rule in a railroad freight tariff, commonly known as the combination rule, the words in which rule were used in their ordinary sense. Both

courts pointed out that while deference should be paid to the conclusions of the Interstate Commerce Commission, they were not bound by those conclusions. Both courts held that the Commission erred as a matter of law in the construction it placed upon the rule.

Petitioners say (p. 4) that the statement of the case in the opinion of the Circuit Court of Appeals correctly recites the history of the controversy, but that the statement that the purpose of the rule was

> "to avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule, * * *."

is a conclusion of the court and is erroneous.

This statement is not erroneous. The Commission itself said (R. 91) that the combination rule was published to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. The plain purpose of the rule, as stated by the Circuit Court of Appeals in its opinion (R. 124),

> "was concededly to insure that a shipper whose rate was made up of two or more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase."

Petitioners had available published through rates from the points of origin of the shipments involved in this case to destination. The rates which petitioners would have paid had they routed their shipments via the routes over which the published through rates applied included, therefore, but one increase.

The case arose out of this fact: petitioners found that by selecting routes from the points of origin, over which routes the published through rates were not applicable,

and by applying the combination rule to the rates in effect via such routes, petitioners were able to obtain rates slightly lower than the published through rates (R. 101-103). Petitioners sought to apply the combination rule, notwithstanding the plain limitation in the rule that it could be used only where no published through rates were in effect.

Petitioners withdrew at the hearing all allegations with respect to the reasonableness of the rates (R. 89). The published through rates were found not unreasonable by the Commission on March 28, 1932 in *Southern Pine Association* v. *A. & W. Ry. Co. et al.*, 183 I. C. C. 191.

Thus petitioners sought to accomplish in the case at bar, by an unwarranted construction of the combination rule, reductions in the published through rates which the Commission itself found were not unreasonable *per se*.

THE COURTS BELOW DID NOT ERR IN THEIR CONSTRUCTION OF THE COMBINATION RULE.

The Commission in its original report in this proceeding deals briefly with the purpose of the combination rule (R. 91) and its application (R. 92). The facts surrounding the publication of the rule are set forth at somewhat greater length in the amendment to the petition (R. 84-85), and in the amendment to the answer (R. 100-106).

Three Circuit Courts of Appeal have recently considered the language of the combination rule to determine whether the Commission erred as a matter of law in construing its language, and in the decisions of these three courts will be found a detailed description of the rule and its purpose (*Hohenberg* v. *Louisville & Nashville Railroad Co.*, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.*, v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415; *Baltimore & Ohio Railroad Co.* v. *Domestic Hard-*

woods, Inc., 65 Fed. (2d) 488). We shall consider these cases later.

The pertinent portion of the combination rule reads as follows (R. 104):

> "Where no published through rates are in effect from point of origin to destination on Lumber * * * carloads, and two or more commodity rate factors * * * are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner * * *."

Then follows the formula for determining the combination through rate and the single increase to be added to that combination rate (R. 92-93, 104-105). It is obvious that the whole purpose of the rule was to insure that shippers located at points of origin, from which points no published through rates were in effect, would pay but one increase in the total through rate.

The first question to be determined is whether there were published through rates in effect via the originating carriers on the shipments of lumber involved in this proceeding from the points of origin to their destination. The record shows that there were such published through rates in effect. (Answer, R. 56; Amendment to Petition, R. 84; Commission's Opinion, R. 89; Amendment to Answer, R. 101).

The condition stated in the rule having been met, it follows that under the plain language of the rule, it may not be applied to the shipments of lumber involved in this proceeding, on all of which shipments through published rates were in effect, applying via the originating carrier and its connections to destination.

The language of the combination rule is plain. It is unambiguous. There is not a word in the rule used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is noth-

ing technical about the rule. It does not contain one technical word. It is clearly and simply stated in simple language.

Tariffs are not framed by lexicographers. Nor are they framed by men given to expressing their language in recondite phrases. They are framed by men who endeavor to express the purpose and intent of the rule in the plainest, simplest, and clearest language possible. The language of the combination rule is characterized by clarity, simplicity and directness. The rules in tariffs must, moreover, be read and applied by hundreds of persons whose duties require them to quote rates and collect freight charges. Where the language of a tariff rule is plain and unambiguous, the rule ought to be construed in accordance with the plain meaning of the language used. The rule ought to be construed as it would be construed by the ordinary man who is required by his daily work to construe and apply the rule. One reading of the combination rule is sufficient to disclose what it means.

The reasoning of the Circuit Court of Appeals on this point is unanswerable (R. 127):

> "It would seem to be clear that when lumber is offered for shipment to the carrier over a designated route, the initial inquiry by the carrier under the guidance of the rule must be as to the existence of a published through fate for the shipment to its destination. If there is no such rate the formula must be applied to a reduction of the combined local rates. If there is such published through rate, the formula is not applied. There is nothing complicated about it, and the shipper having a through rate available is subjected to no unreasonable or inequitable exaction."

The courts below were right in their construction of the combination rule.

THE CASE DID NOT CALL FOR THE EXERCISE OF THE ADMINISTRATIVE DISCRETION OF THE COMMISSION. PRELIMINARY RESORT TO THE COMMISSION WAS THEREFORE UNNECESSARY AND ITS DECISION IS NOT BINDING OR CONCLUSIVE ON THE COURTS.

The petitioners argue (p. 17) that the application to the Commission in this case was not only proper but absolutely necessary. They state that chief among the questions of fact was the question whether or not the routes over which the shipments moved or should have moved were reasonable routes. The decisions of the Commission in this case show on their face (R. 16, 88, 89, 95, 96) that the Commission did not decide in this case any question involving the exercise of its administrative discretion. The Commission did not consider and dispose of any question respecting the reasonableness of the rule itself, the reasonableness of the rates under Section 1 of the Interstate Commerce Act, or unjust discrimination under Section 2, or undue preference under Section 3 (49 U. S. C. A. Secs. 1, 2, 3). And especially do respondents point out that the Commission did not pass upon or consider any question regarding the reasonableness of the routes over which the published through rates or combination rates applied, or the adequacy of such routes, their number, or their length. The Commission said (R. 89) that at the hearing all allegations with respect to the reasonableness of the rates were withdrawn except as to rates not material here, and that the question of tariff interpretation presented the principle issue for determination.

The findings of the Commission (R. 95) do not deal with any question arising under Sections 1, 2 or 3, or any question regarding the reasonableness or lawfulness of rates or routes or rules. Its findings comprehend only the determination of what were the applicable rates under the tariff, that is to say, how the tariff should be construed.

The Commission construed the language of the combination rule and held that the carriers had placed an unlawful construction upon that rule and had collected overcharges (R. 96), thus violating Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7)). This paragraph requires carriers to file and publish tariffs naming their rates and forbids them from charging or demanding or collecting or receiving a greater or less or different compensation for the transportation of property than the rates, fares, and charges specified in their tariffs filed with the Commission and in effect at the time.

The petitioners quote what this Court said in *Great Northern Railway Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285, that where the document to be construed is a tariff, and before it can be construed it is necessary to determine upon the evidence the peculiar meaning of words, or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission. Respondents do not dispute this principle of law. But petitioners failed to quote the conclusions of this Court in the case just cited (p. 294):

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Company case*, or in the *Loomis Case*. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. The operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. * * *"

The task before the courts in this case was precisely the same as that in the case just cited: to determine the meaning of words in the tariff that were used in their ordinary sense and to apply that meaning to the undisputed facts.

The combination rule contains no words used in a pe-

culiar meaning, no words used in other than their ordinary sense, no words, extrinsic evidence with respect to which was necessary to determine the sense in which they were used.

The courts below were right in their conclusion that the case presented no question of fact, no question involving the exercise of the Commission's administrative discretion. The question was solely one of law involving, as it did, the interpretation of a tariff rule in which words were used in their ordinary sense only.

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN BALTIMORE & OHIO RAILROAD COMPANY vs. DOMESTIC HARDWOODS, INC., 65 FED. (2D) 488, WAS UNSOUND AND IN REFUSING TO FOLLOW THAT DECISION.

THE DECISION IN THE BALTIMORE & OHIO CASE NOT ONLY WAS PLAINLY ERRONEOUS AS A MATTER OF LAW, BUT WAS DISTINGUISHABLE FROM THE PRESENT CASE ON THE FACTS.

Petitioners quote (pp. 23-25) that portion of the opinion of the Circuit Court of Appeals setting forth its reasons for refusing to follow the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488, in which latter case the court followed the construction that the Interstate Commerce Commission placed upon the combination rule.

There is a conflict between the decisions of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case* and of the Circuit Court of Appeals for the Sixth Circuit in this case, respecting the construction to be placed on the combination rule. But it only requires a reading of the combination rule to see that the construction placed upon that rule by the Commission and by the Court of Appeals of the District of Columbia was erroneous as a mat-

ter of law. Respondents refer here to what they have heretofore said (pp. 3-5) on this point.

The Court of Appeals of the District of Columbia in the first place seemed to feel that the decision of the Commission was controlling, and that the court should not exercise its own and independent judgment on the question whether the Commission's construction of the rule was lawful. The court said (65 Fed. (2d) p. 492) that the carriers took the position that the Jones rule (the combination rule) is applicable only where there is no joint through rate via any route, that this the Commission held was not the correct interpretation, and that the court found itself in agreement with the Commission's conclusion,

> "though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would present more difficulty, for the language is undoubtedly broad enough to be construed as contended by the carriers. * * *"

The court went on to say that the question involves more than the mere interpretation of words, that it really goes to the interpretation and construction of railroad rates and routing, a technical subject, and as to which the Commission has expert knowledge superior to that possessed by any court.

Respondents refer again to the Commission's decisions in this case (R. 15, 87) which show on their face that the Commission did not consider any question involving the construction of rates or routing, that the Commission merely considered and construed the language of a tariff rule.

The Court of Appeals then set forth some reasons why in its opinion the construction placed by the Commission on the combination rule was not strained, unreasonable or unnatural (p. 492). The fallacy underlying all these reasons of the court is concisely stated by the Circuit Court

of Appeals in its decision in the case at bar (R. 127-128). It is sufficient here to state that the Court of Appeals of the District of Columbia seemed to proceed on the theory that the case involved some question of the reasonableness of the routes, and that the combination rule served as a means of prohibiting railroads from establishing routes unreasonably long or through congested centers, or establishing through routes impossible in practical use. The Court of Appeals wholly overlooked the fact that the power of the Interstate Commerce Commission to deal with the reasonableness of routes, to establish reasonable routes, is not found in the provisions of Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7)), requiring carriers to file and publish tariffs naming their rates and requiring adherence to those rates, but is found in Paragraph (3) of Section 15 of the Act (49 U. S. C. A. Sec. 15 (3)), authorizing the Commission to establish through routes whenever it finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes, as well as in Paragraph (7) of the same section, authorizing the Commission to suspend any new individual or joint rate pending investigaton as to its lawfulness.

The Court of Appeals dealt with the case as if it involved the reasonableness *per se* of the combination rule. The court overlooked the fact that the case did not call for the exercise of the administrative discretion of the Commission, and that the case presented the sole question of the proper interpretation of the language in the combination rule, a question of law alone.

The court in the *Baltimore & Ohio Case,* to paraphrase the language of this Court in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, in which this Court held that the construction placed by the Commission upon Paragraph (4) of Section 15 of the Interstate Commerce Act

(49 U. S. C. A. Sec. 15 (4)) was erroneous, conjured up conditions to raise doubts in order that resort might be had to construction, when the language was so clear that there existed no room for construction (pp. 277-278).

What we have just said answers petitioners' contentions (pp. 8, 9, 18, 25) that the decision here sought to be reviewed deprives the shipper of the right given him by Paragraph (8) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (8)) to route his shipments, unless the shipper is willing to pay a double increase in his rates, and results in the closing of routes heretofore open to the shipper. The shipper has, of course, under the Act, the right to designate the routing of his shipments, but he is not entitled to an unlimited number of reasonable routes. There is no requirement in the Act that the rates over every possible route that can be worked out between two stations in the United States must be the same. Petitioners did not invoke Paragraph (3) of Section 15 of the Act which, as stated, authorizes the Commission to establish through routes when necessary or desirable in the public interest. The record shows that petitioners had available published through routes from all the stations from which they made the shipments involved in this case, and in ample number and variety (R. 101-102). The Commission's opinion did not deal at all with the establishment of routes, or their closing, or their reasonableness, or their adequacy, or the right to route, for the reason that petitioners did not raise any such issue. The only issue raised by petitioners was one under Section 6 of the Act: whether the carriers had lawfully construed the language used in a tariff rule.

There are, moreover, facts in the case at bar which distinguish it from the *Baltimore & Ohio Case*.

Respondents in the amendment to their answer (R. 106-107) set forth instances of how the construction placed by the Commission on the combination rule would have re-

sulted in violations of the long-and-short-haul clause of Section 4 of the Act (49 U. S. C. A. Sec. 4 (1)). If the Commission had construed the rule as the railroads contended it should be construed and as the courts below found it should be construed, no violations of law would have resulted. The Commission itself in its report (R. 93) refers to the contentions of the railroads that, if the tariffs had been applied as the petitioners contend, violations of the long-and-short-haul clause of Section 4 would have resulted, and the Commission itself gives an example of how these violations would have been brought about (R. 93).

All these facts were before the Commission. It had the choice of construing the combination rule in such a way as to avoid violations of the long-and-short-haul clause of Section 4 of the Act. It failed to do so.

The decision in *Great Northern Railway Company* v. *Delmar*, 283 U. S. 686, makes it plain that in failing to do so the Commission erred. In that case this Court applied to the construction of railroad freight tariffs the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. The Commission should therefore have construed the rule in such a way as to avoid a violation of law.

The situation presented in the case at bar with respect to violations of Section 4 was not present in the *Baltimore & Ohio Case*. These facts distinguish the case at bar from the *Baltimore & Ohio Case*, and make it clear that the Commission erred as a matter of law in construing the combination rule as it did.

The courts below in the case at bar made no reference to the violations of Section 4 that would have resulted if the combination rule had been construed as the Commission construed it. Both courts apparently reached the conclu-

sion that the language of the rule was so plain and unambiguous that there was no need of considering this aspect of the case.

Respondents submit that the court below did not err in holding that the decision of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case* was unsound and in refusing to follow that decision.

THE COURT BELOW DID NOT ERR IN FAILING TO GIVE WEIGHT TO WHAT PETITIONERS CLAIM WAS A CONTEMPORANEOUS CONSTRUCTION OF THE COMBINATION RULE.

Petitioners refer (p. 20) to the statement in the amendment to their petition that for several years after 1920 the railroads applied the combination rule, that in 1923 the southern railroads for the first time took the position that the rule did not apply in cases where there was a through rate by any route, and undertook to amend their tariffs so as to specifically so provide, but that the Commission declined to permit such an amendment. Petitioners say that on demurrer this allegation must be taken as true.

The rail carriers ever since the rule has been in effect have of course applied the rule to shipments of lumber where the rule by its terms was applicable. Petitioners' brief, moreover, shows on its face that these respondents have persistently questioned the construction placed by the Commission on the combination rule over a long period of time. Petitioners cite (p. 16) no less than nine decisions of the Commission in each of which these railroad respondents contended that the rule should be construed as the respondents here contend it should be construed. The first of these cases is *McGowan-Foshee Lumber Co.* v. *A., F. & G. Ry. Co., et al.*, 95 I. C. C. 451. This case, decided by the Commission as far back as January 12, 1925, involved a shipment moving in 1921. The case at bar involved a shipment moving in 1920 (R. 88).

The Commission itself has said that the fact that for approximately twenty-five years carriers and shippers have interpreted a tariff uniformly, is not conclusive that the interpretation is correct, but is entitled to consideration (*Thames & Co.* v. *Chesapeake & Ohio Railroad Co., et al.*, 194 I. C. C. 188, p. 189). The Commission has also said that a reasonable doubt concerning the meaning of transit tariffs warrants the interpretation which has been placed upon them by the parties (*Parkersburg Rig & Reel Co.* v. *Chicago & North Western Railway Co.*, 198 I. C. C. 709, p. 712).

But here no reasonable doubt can arise with respect to the meaning of the combination rule. An unlawful construction by either carriers or shippers of a tariff rule, plain and unambiguous in its language, does not make such construction by either shippers or carriers the lawful one. The question here before the court is whether the language of the combination rule admits of any possible ambiguity. The Circuit Court of Appeals in its opinion in the case at bar (R. 126) said that freight tariffs must be applied as written, that effect must be given if possible to every word, clause, and sentence, and that the practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument, quoting what this Court said in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, p. 280, that the language of that provision of the Interstate Commerce Act there before the court was so clear and its meaning so plain that no difficulty attended its construction.

TWO CIRCUIT COURTS OF APPEAL HAVE RECENTLY HELD THAT THE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO CONSTRUE ANOTHER PORTION OF THE COMBINATION RULE IN ACCORDANCE WITH THE LANGUAGE USED.

One of the limitations attached to the use of the combination rule, as shown by two recent decisions of the Circuit Courts of Appeal (*Hohenberg* v. *Louisville & Nashville Railroad Co.*, Fifth Circuit, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.* v. *Walsh Fire Clay Products Co.*, Eighth Circuit, 60 Fed. (2d) 415), is that it may be used only when the tariffs naming the freight rates themselves provide that those rates are subject to the rule. There is no question in the case at bar with respect to this limitation.

Notwithstanding the plain language contained in this limitation, the Commission held in a long line of cases that the combination rule applied to the construction of rates over two or more carriers where no published through rate was in effect, if the tariff of one carrier alone contained a reference to the combination rule. Under the rule as written, it may not be used unless all the tariffs naming the separate rates or factors making up the combination through rate refer to the rule.

The Commission in the decisions considered by the Circuit Courts of Appeal in the cases just cited did precisely what it did in the case at bar: it failed to construe the language of the rule in accordance with the plain meaning of the words used. It failed to apply a plain and unambiguous rule in the tariff as that rule was written. Both courts held that the Commission erred as a matter of law in doing so. These two decisions show that the decision of the Circuit Court of Appeals in the case at bar is right and that the decision of the Court of Appeals of the District of Columbia is wrong.

CONCLUSIONS.

The language of the combination rule is characterized by such directness, clarity and simplicity, its meaning is so plain, it is so wholly lacking in any ambiguity that, to use the language of this Court in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, there is no room for construction. The courts below were right in construing the combination rule as it was written.

Respondents respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100

W. P. BROWN & SONS LUMBER COMPANY, ET AL.,
Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100

W. P. BROWN & SONS LUMBER COMPANY, ET AL.,
Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

STATEMENT.

Petitioners (who were plaintiffs in the District Court), filed this suit in the District Court under Paragraph (2) of Section 16 of the Interstate Commerce Act (49 U. S. C. A., Sec. 16 (2)), to recover reparation under an award (R. 24-27) of the Interstate Commerce Commission dated February 9, 1932 in the proceeding known as *Wausau Southern Lumber Co. et al.* v. *Alabama Great Southern Railroad Co. et al.* The decisions of the Commission in this proceeding are reported in 142 I. C. C. 521 (R. 40) and 182 I. C. C. 731 (R. 13).

The case as finally decided by the Commission involved no question of administrative discretion on its part. The

question, solely one of law, was whether these respondent railroads had lawfully construed the language of the rule in their tariffs commonly known as the combination rule, the words in which rule were used in their ordinary sense.

The Commission found that these respondents had placed an unlawful construction on the rule, had collected more than the applicable rates, and the Commission awarded reparation for the amount of the overcharges.

These respondents filed an answer (R. 27) to the original petition (R. 1), and later filed an amendment to their answer (R. 54). Petitioners also filed an amendment to their petition (R. 35). Petitioners filed a demurrer (R. 64) to the answer and to the answer as amended, and these respondents filed a demurrer (R. 63) to the petition as amended.

The District Court, following an argument before it on the demurrers, reached the conclusion (memorandum opinion R. 65, 7 Fed. Supp. 593), that the Commission's reparation order upon which the action was based was founded upon an incorrect interpretation of the combination rule and that the petitioners were not entitled to reparation in that action upon the award of reparation made by the Commission. The court sustained the respondents' demurrer to the petition as amended, and overruled petitioners' demurrer to Paragraph III of the answer as amended (R. 67), and from this decision an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit. That court affirmed the decision of the District Court (R. 74, 82 Fed. (2d) 94).

This Court granted a writ of certiorari on October 12, 1936 to the Circuit Court of Appeals for the Sixth Circuit.

The circumstances that have given rise to this litigation are as follows:

The shipments of lumber covered by the Commission's

order of reparation in this case moved from points of origin in the South and the Southwest to destinations in the North (R. 42). At the time the shipments moved published through rates on lumber (sometimes referred to as "joint" or "single factor" through rates, as in the Commission's report, R. 43), were in effect from the points of origin of all these shipments to their destinations (answer R. 31, amendment to answer R. 55, Commission's report R. 43). These published through rates were restricted to apply via certain routes specified in the tariffs (Commission's report R. 43). There was no question in the case respecting the reasonableness of the rates, the Commission pointing out (R. 42) that all allegations with respect to the reasonableness of the rates were withdrawn at the hearing with an exception not pertinent here. Nor was there any question in the case respecting the reasonableness of the routes over which these published through rates applied. There was no contention that the routes over which the published through rates applied were insufficient in any respect or were inadequate.

But there is such a multiplicity of carriers and routes from the lumber-producing territory in the South and the Southwest to the vast consuming territory in the North, that it is possible to work out many routes, composed of portions of the lines of the various carriers, over which the published through rates did not apply under the specific routing provisions contained in the tariffs naming those rates. The lawful rate applicable to the shipments of lumber moving over the routes over which the published through rates were not applicable would be the combination of the local rates of the carriers making up that route. The combination was higher than the published through rate.

Paragraph (1) of Section 6 of the Interstate Commerce

Act (49 U. S. C. A., Sec. 6 (1)) recognizes the distinction between a joint rate, that is to say, a published through rate that applies over the line of two or more railroads, and through rates that are made up of separately established local rates. Paragraph (1) of Section 6 provides that every common carrier subject to the Act shall file with the Commission and print and keep open for public inspection schedules showing all the rates for the transportation between different points on its own route and between points on its own route and points on the route of any other carrier when a through route and a joint rate have been established. It goes on to provide, however, that if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open for public inspection, the separately established rates applicable to the through transportation.

There is no requirement in the Interstate Commerce Act that the rate via every route between two points must be the same, or that carriers must establish a joint rate, that is to say, a published through rate, via every route between any two points. It would indeed be impracticable to establish through, single-factor rates, from each and every station in the United States to every other station via each of the myriad routes that can be worked out between such stations. The Interstate Commerce Commission, however, is given the power under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (3), Appendix A), whenever the Commission deems it necessary or desirable in the public interest, after a full hearing, to establish through routes and joint rates. The Commission itself has said[1] that the law does not require it to establish through routes and joint rates in all instances where carriers have neglected

(1) *New York Dock Railway* v. *Baltimore & Ohio Railroad Co.*, 32 I. C. C. 568, p. 573.

or refused to do so, but empowers the Commission to do so in proper cases. Petitioners, as can be seen from a reading of the Commission's reports in the case at bar (R. 40, 13), did not invoke the power that the Commission possesses under Paragraph (3) of Section 15, and raised no question regarding the reasonableness *per se* of the routes, their sufficiency or their adequacy.

The carriers in the past years, in order to meet the rising tide of expenses, have increased their rates pursuant to the authority of the Director General of Railroads (General Order No. 28) or the Interstate Commerce Commission (*Increased Rates*, 1920, 58 I. C. C. 220). As pointed out by the petitioners in the amendment to their petition (R. 38), under General Order No. 28 the lumber rates were increased 25 per cent, subject to a maximum of 5 cents per 100 pounds in any rate, that is to say, there was to be applied to each and every rate on lumber in the United States an increase of 25 per cent but not exceeding an increase of 5 cents per 100 pounds.

It can readily be seen that where a shipment moved via a route over which there was in effect one published through rate, that rate would be increased but once and by 5 cents per 100 pounds, but that if the shipment moved over a route the rate over which route was made up of the combination of the separately established local rates of the carriers making up the through route, each local rate would be increased 5 cents per 100 pounds, and thus a shipper under these circumstances would pay double and sometimes triple increases in the rates.

There are many small and unimportant stations located on the lines of the railroads in the United States, and as we have heretofore pointed out, it is not practicable to publish through rates from each and every station in the United States to every other station, irrespective of size and importance. And as we have seen, the Interstate Com-

merce Act does not contemplate or require it, for it gives the Commission the power to determine in any case whether the railroads should be required to establish through routes and joint rates.

In order to avoid such an inequality in rates as between shippers, and in order to insure that shippers located at points of origin from which no published through single-factor rates were in effect would pay but one increase, just as shippers located at points from which published through single-factor rates were in effect would pay but one increase, the Director General of Railroads devised what is commonly known as the combination rule. As stated by the Commission itself in its original report in this proceeding (R. 45):

> "The combination rule was originally published by the Director General about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. * * *"

The facts surrounding the publication of the combination rule are set forth at somewhat greater length in the amendment to the petition (R. 38, 39), and in the amendment to the answer (R. 54-61). Four Circuit Courts of Appeal have recently had occasion to consider the language of the combination rule for the purpose of determining whether the Commission erred as a matter of law in construing the language, and in the decisions of these courts will be found a detailed description of the rule and its purpose.[1]

(1) *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488; *Hohenberg* v. *L. & N. R. R. Co.*, 46 Fed. (2d) 952, certiorari denied 284 U. S. 617; *Hygrade Food Products Corp.* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2d) 113; *Wheelock et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415.

We shall consider these cases later.

As stated by the Court of Appeals for the Second Circuit in one of these cases, the *Hygrade Corporation case*, 85 Fed. (2d) 113, (p. 114):

> "* * * The flat increase was fair enough when applied to a local rate or a one-factor through rate between the points of origin and destination but resulted in duplication of the increase when the through rate was a combination of 'factors' (intermediate rates) to each of which the increase was applied. To remedy this, a formula was devised for constructing combination rates by which the increase granted was less than the aggregate of the increases on the several constituent rates or factors. * * *"

The pertinent portion of the combination rule reads as follows (R. 58, 59):

> "Where no published through rates are in effect from point of origin to destination on Lumber * * * carloads, and two or more commodity rate factors * * * are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner * * *"

Then follows the formula for determining the combination through rate and the single increase to be added to that combination through rate (R. 45, 46, 58-60). It is obvious that the whole purpose of the rule was to insure that shippers located at points of origin, from which points of origin via the railroads serving such points no published through rates were in effect, would pay but one increase in the rate.

It is to be borne in mind that at the time the shipments of lumber involved in this controversy moved, published through rates applying on such shipments were in effect from the points of origin of these shipments to their destinations, and that those published through rates included therefore but one increase in the rates.

The respondents in the amendment to their answer (R. 54-60) have set forth the rate situation by the use of a

concrete example of a rate from a typical lumber producing point (Laurel, Mississippi) to a typical point of destination (Columbus, Ohio). The published through rate from Laurel to Columbus, applying from Laurel via each of the originating carriers at that point was 43c per 100 pounds. The combination rate unaffected by the combination rule, applying over routes over which the published through rate did not apply, was 43½c, or ½c more than the published through rate of 43c. If this combination rate of 43½c is treated by the combination rule, the rate would be 40½c.

The petitioners therefore brought their complaint before the Commission to obtain a refund of the overcharges which they contended the carriers had collected on the shipments that moved over the routes over which the combination basis of rates was in effect. The petitioners contended, in the case of the example just referred to, that the lawful rate was 40½c and not 43½c, and that they had been overcharged by 3c.

The Interstate Commerce Commission found that the construction placed by the carriers upon the combination rule was erroneous as a matter of law, that the combination rule applied on these shipments, notwithstanding the fact that published through rates were in effect from all the points of origin of these shipments. The Commission further found that the charges that had been collected by the carriers on the shipments of lumber involved in this case were over and above the charges lawfully applicable thereto, (a violation of Paragraph (7) of Section 6 of the Interstate Commerce Act, 49 U. S. C. A., Sec. 6 (7) Appendix B), and these respondents were directed by the Commission's order of February 9, 1932 (R. 24) to pay to petitioners the amount of the overcharges.

If the Commission was right in its construction of the combination rule, the respondents were also chargeable

with misrouting with respect to certain shipments, in that they either failed to forward the shipments via the routes designated by the petitioners, over which the combination basis of rates applied, and which basis when modified by the use of the combination rule produced somewhat lower rates than the published through rates, or failed, where there were no routing instructions, to forward the shipments via such routes. This aspect of the case was referred to by the District Court in the third paragraph of its memorandum opinion (R. 65). The liability of the respondents in each case, however, depends upon whether the Commission erred in its construction of the combination rule. If the Commission erred in the interpretation it placed upon the rule, there was no misrouting. The Commission itself said in its report (R. 42) that the alleged misrouting was dependent upon the tariff interpretation, and that this question of tariff interpretation presented the principal question for determination.

Some of the northern railroads paid the award of reparation in accordance with the order of the Commission on the shipments that were delivered by such railroads. Other railroads, including principally the railroads in the Southern Territory that originated the shipments, the respondents here before this court, believing that the Commission's construction of the combination rule was plainly erroneous as a matter of law and that no overcharges were due these petitioners, refused to pay the award of reparation directed against them, following which this suit was brought in the District Court to recover on the unpaid portion of the award made by the Commission.

SUMMARY OF ARGUMENT.

The first question to be determined is whether the decision of the Interstate Commerce Commission is conclusive and binding upon the courts. The petition and amended petition filed by the petitioners in the District Court (R. 5, 35), and the Commission's opinions (R. 13, 40), show that the Commission did not have before it in the case at bar any question calling for the exercise of its administrative discretion, that it was not called upon to consider any question respecting the reasonableness of rates or routes, that on the contrary, it had before it for construction a rule in a railroad freight tariff, the words in which were all used in their ordinary sense. The construction of the rule requires no technical or expert knowledge. The question was solely one of law, and while deference will be paid to the Commission's conclusions on such a question, the courts are not bound by them.

The second question is whether the Commission was right in the construction it placed upon the combination rule. The rule provided that where no published through rates were in effect from the point of origin to destination, and combination rates were used in arriving at the through rate, the through combination rate would be arrived at in the manner provided for in the rule. Published through rates were in effect from the points of origin to the points of destination of all the shipments covered by the Commission's order of reparation in this case. The condition in the rule having been met, it follows that under the plain language of the rule it may not be applied to the shipments of lumber involved in this proceeding.

The language of the combination rule is clear and unambiguous. No word in the rule is used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is nothing technical about the rule. It is clearly and simply stated in simple language. The language of the rule is so clear and its meaning so plain that no difficulty attends its construction. The Commission is bound by the words employed.

The courts below in the case at bar were justified in refusing to follow the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488, in which the Court of Appeals placed the same construction upon the combination rule as did the Commission in the case at bar. The Court of Appeals sustained the Commission's construction on the ground that it was conceivable that through routes might be established over longer routes and through congested centers which would increase cost and delay delivery, and that the construction placed by the Interstate Commerce Commission upon the combination rule would prevent the establishment of such unreasonable routes and rates.

The Court of Appeals in the *Baltimore & Ohio case* overlooked the fact that the power which the Interstate Commerce Commission has to require the establishment of through routes and joint rates is not found in its power to construe tariffs and to determine applicable rates, but is found in the power vested in it by Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (3)), which authorizes the Commission to require carriers to establish additional through routes whenever the Commission finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes. Petitioners in the case at bar raised no issue before the Commission respecting the reasonableness of the routes,

and did not invoke the exercise of the Commission's power under Paragraph 3 of Section 15.

It is clear, moreover, that the Court of Appeals recognized that it would have no great difficulty in accepting the carriers' view on the interpretation of the combination rule were it not a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject as to which the Commission was presumed to have expert knowledge, superior to that of the court.

The Circuit Court of Appeals in the case at bar was right, in its conclusion (R. 79) that it perceived no inherent technical question in determining whether the rule means what it says, and it was justified in refusing to follow the reasoning of the Court of Appeals in the *Baltimore & Ohio Case*. It was the conflict between the decision of the Court of Appeals in the *Baltimore & Ohio Case* and the Circuit Court of Appeals in the case at bar that was the principal ground urged by the petitioners in their application for a writ of certiorari.

Three different Circuit Courts of Appeal have recently held that the Interstate Commerce Commission erred as a matter of law in failing to construe another portion of this same combination rule in accordance with the plain meaning of the language used. The principle applied by these three Circuit Courts of Appeal that the rule should be construed in accordance with the plain meaning of the language used, has equal application to this case. As was well stated by the court in *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 85 Fed. (2d) 113 (p. 116), the construction of the rule involved words in their ordinary meaning and required no technical or expert knowledge possessed by the Interstate Commerce Commission.

The fact that the Interstate Commerce Commission had long construed the combination rule as it did in the case at bar is not controlling where that construction is contrary to the plain meaning of the rule. It is elementary that where no ambiguity exists there is no room for construction. The question is not what construction the rail carriers or some of them at one time may have placed upon the combination rule, but the lawful construction of that rule. Petitioners point out a great many cases decided by the Interstate Commerce Commission which but illustrate the long-continued opposition of these respondents to the construction placed by the Commission upon the rule.

The construction placed by the Commission upon the combination rule would have resulted in violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act (49 U. S. C. A., Sec. 4). And if it be assumed that any possible doubt can arise with respect to the meaning of the rule, it is clear that the Commission erred in adopting that construction which would have resulted in a violation of law.

ARGUMENT.

THE SOLE QUESTION BEFORE THE INTERSTATE COMMERCE COMMISSION WAS THE CONSTRUCTION TO BE PLACED UPON WORDS IN A TARIFF RULE USED IN THEIR ORDINARY MEANING. THIS WAS A QUESTION NOT OF FACT BUT OF LAW.

THE QUESTION DID NOT CALL FOR THE EXERCISE OF THE ADMINISTRATIVE DISCRETION OF THE COMMISSION. PRELIMINARY RESORT TO THE COMMISSION WAS NOT REQUIRED AND ITS DECISION THEREFORE IS NOT BINDING OR CONCLUSIVE ON THE COURTS.

As stated by the Circuit Court of Appeals in its opinion in the case at bar (R. 76):

> "The first question to be determined is the conclusiveness of the Commission's award. If the question were one of fact, or involved the exercise of

administrative discretion, we are bound by the decision."

The Commission's original report, 142 I. C. C. 521 (R. 40), its findings (R. 49, 50), and its report on further hearing, 182 I. C. C. 731 (R. 13), in this proceeding, show on their face that the Commission did not decide any question involving the exercise of its administrative discretion. The Commission did not consider and dispose of any issues respecting the reasonableness of the combination rule itself, the reasonableness of rates under Section 1 of the Interstate Commerce Act, or unjust discrimination under Section 2, or undue preference under Section 3 (49 U. S. C. A. Secs. 1, 2, and 3), issues which present questions of fact requiring the prior determination of the Commission. Nor did the Commission pass upon or consider any question regarding the reasonableness of the routes over which the published through rates or the combination rates applied, a question also requiring prior determination of the Commission. These petitioners raised no question before the Commission respecting the reasonableness of the routes and did not invoke the power that the Commission has under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3), Appendix A), to establish through routes when it finds such through routes necessary or desirable in the public interest, and to fix reasonable rates for application over such routes.

The sole question, on the other hand, decided by the Commission was the lawful construction of a rule in a railroad freight tariff. The Commission construed the language of the combination rule, held that the carriers had placed an unlawful construction upon the rule, had collected more than their published tariff rates, and had thus violated Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7), Appendix B).

If the Commission was right in its construction of the rule, the carriers, as we have heretofore pointed out, were also chargeable with misrouting with respect to certain

shipments. If the Commission was wrong, there was no misrouting.

The Commission, in passing upon the sole question disposed of by it, construed the tariff rule, and determined what the applicable rates were under the construction placed by it upon the tariff rule (R. 49).

There was no dispute between the parties as to the facts. The case did not call for a consideration and weighing of conflicting evidence. The only dispute was as to how the tariff rule should be read, interpreted and applied. The petitioners, if they had chosen to do so, could have brought this suit in the first instance in a District Court for the purpose of having the court determine the lawful construction of the combination rule (*Section 9 of Interstate Commerce Act,* 49 U. S. C. A. Sec. 9; *Standard Oil Co. of Indiana* v. *United States,* 283 U. S. 235).

We are thus met with the question of the weight to be given by the court to the conclusions of the Commission on a matter of law. Must the court accept those conclusions as conclusive, or may it determine the question of law unshackled and untrammelled by what the Commission has found? The answer to this question is found in the decisions of the Supreme Court of the United States and the Federal courts.

In *Great Northern Ry. Co.* v. *Merchants' Elevator Co.,* 259 U. S. 285, this Court had before it a judgment of the Supreme Court of Minnesota affirming a judgment of the lower court for the plaintiff in a suit against an interstate carrier for $80 overcharges, exacted in violation of certain provisions of the carrier's tariff. There was no dispute concerning the facts, and the question argued before this Court was not whether the State court erred in construing or applying the tariff, but whether that court had any jurisdiction of the controversy, in view of the fact

that the Commission had not passed upon the disputed question of construction (p. 290).

This Court said that where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words, or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission, and that not until this determination has been made can a court take jurisdiction of the controversy. But this Court after stating (p. 293) that it may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction, and that the dispute may be merely whether words used in the tariff were used in their ordinary meaning or in a peculiar meaning, and that this was the situation in *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, said (p. 294):

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case*, or in the *Loomis Case*. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. The operation was solely one of construction; and preliminary resort to the Commision was, therefore, unnecessary. * * *"

The task before the Court in this proceeding is precisely the same as the task before the Minnesota Supreme Court in the case just cited: to determine the meaning of words of the tariff that were used in their ordinary sense, and to apply that meaning to the undisputed facts.

The combination rule contains no words used in a peculiar meaning, no words used in other than their ordinary

sense, no words, extrinsic evidence with respect to which is necessary to determine the sense in which they are used, and no words that a court cannot readily and easily understand without prior interpretation by the Commission.

The language of the Circuit Court of Appeals for the Second Circuit is *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 85 Fed. (2d) 113, in which the court held that the Commission erred as a matter of law in construing another part of this same rule, has equal application to the case at bar. The court said that the construction of the combination rule involves words used in their ordinary meaning and requires no technical or expert knowledge possessed by the Interstate Commerce Commission, and that under these circumstances courts are at liberty to decide independently of the Commission. (p. 116.)

To the same effect is *Wheelock et al.* v. *Walsh Fireclay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, p. 418.

Petitioners, in seeking to argue (p. 16) that preliminary resort to the Commission was not only proper but necessary, would turn this case before this Court into an entirely different kind of case from the case the petitioners made before the Commission. Petitioners suggest (p. 19) that whether an interpretation should be adopted which would result in a commercial closing of numerous routes which have long been in existence, was certainly an administrative question requiring serious consideration by the Commission. And petitioners then give an example of a possible case where a shipper of lumber might find it to his interest to use a route over which the published through rates were not applicable.

Petitioners here are simply trying to make the case they made before the Commission into a different case in this Court. As can be seen from an examination of the Com-

mission's reports (R. 13, 40), the petitioners raised no question under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3), Appendix A), under which the Commission possesses the power to require railroads to establish through routes that the Commission finds necessary or desirable in the public interest, and to fix the rates over such routes. There was an ample number of routes from the lumber shipping points in question to destinations in the North over which the published through rates applied (R. 56). There is not the slightest suggestion in the Commission's reports that petitioners forwarded their shipments via the routes over which the published through rates were not applicable in order to enable petitioners to obtain a stoppage-in-transit privilege at an intermediate point. No such question was presented to the Commission as the Commission's reports show. Petitioners forwarded their shipments over the combination routes over which the published through rates were not applicable in the hope and expectation that they could, by the strained construction they have sought to place upon the combination rule, cut the published through rate. The case was not at all one involving the reasonableness of routes, but as shown by the reports of the Commission, one involving the construction to be placed upon the language of a tariff rule. The petitioners were not interested in transit privileges on any of the roads. They made no point respecting those privileges. They were interested in obtaining, through an unlawful construction of the combination rule, reductions in the published through rates.

Petitioners quote a paragraph from the Commission's report (R. 48) which concludes with a statement by the Commission that it does not consider that the particular circumstances of these cases justified the use of routes over which the higher rates are applicable. But the Court will see from a reading of the particular page of the Com-

mission's report on which this sentence appears (R. 48) that the Commission was there dealing with unrouted shipments. These respondents forwarded the unrouted shipments via the routes over which the published through rates were applicable. If petitioners' construction of the combination rule is right, then lower rates were available via the routes over which the combination basis of rates applied, which combination basis when reduced by the application of the combination rule, would result in a lesser rate than the published through rate. Under these circumstances, and assuming the correctness of the petitioners' construction of the combination rule, it would be the duty of these respondents to forward unrouted shipments via the routes over which the lowest rates applied.

But the Court can see that this question of misrouting turns upon the correctness of the construction of the combination rule made by the Commission, and we get back to the question therefore whether that construction was lawful. The Commission, in stating (R. 48) that it did not consider that the particular circumstances justified the use of the routes over which the higher rates were applicable, assumed the correctness of its construction of the combination rule, under which the published through rates were higher than the combination rates applying via the combination routes, when those combination rates were treated by the application of the combination rule. The Commission recognized this point earlier in its report (R. 42, 43) when it said that:

> "The alleged misrouting is dependent upon the question of tariff interpretation, and that question therefore presents the principal issue for determination."

Respondents are sure it will be conceded that if they are right in their construction of the rule there was no misrouting, and they concede that if they are wrong there was misrouting.

Petitioners argue (p. 17) that the Circuit Court of Appeals recognized (opinion, R. 74) that

> "an understanding of the point in dispute requires exposition of its historical setting."

And petitioners argue that this is conclusive that the question goes beyond the mere interpretation of the ordinary meaning of words.

But this Court will see that the Circuit Court of Appeals merely sought to ascertain the reason for the rule, a natural inquiry. These respondents submit that there is nothing in the language of the rule, in its history, its purpose, or its application that envelopes it in such mystery and shrouds it in such recondite meaning as to make it impossible for a court of justice to understand the purpose or the meaning of the rule.

Petitioners lay great stress upon the decision of this Court in *Standard Oil Company* v. *United States,* 283 U. S. 235, in which this Court had before it an appeal from an order of the Interstate Commerce Commission dismissing two complaints filed with the Commission to recover damages for alleged overcharges. The Court said that it was evident from an inspection of the record, as the Commission said in its first report, that the cases concerned unusually complicated and technical tariff determinations, the proper determination of which called for the exercise of the trained judgment of that body of experts appointed by law and informed by experience. This Court, therefore, said that the order of the Commission being a negative one was not susceptible of review by courts.

But this Court went on to say that putting aside this ground entirely, it thought the District Court was without jurisdiction, that the Standard Oil Company, having elected to proceed to a determination before the Commission respecting the question whether it had been charged more than

the lawful rates provided for in the tariffs, was precluded from seeking reparation upon the same claims by an alternative method of procedure.

It only requires a reading of the decisions of the Commission in the cases that were the subject of the Standard Oil Company's suit (*Standard Oil Company (Indiana)* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, 113 I. C. C. 597 and 139 I. C. C. 297), to see that they involved unusually complicated and technical tariff situations, wholly different from the tariff situation which is the subject-matter of this suit.

That the question in the case at bar involved no complicated and technical tariff situations is shown by the approach of the courts below to the question and their decisions thereon (R. 65, 74) as well as by the decisions of the Commission itself. (R. 40, 13.)

The Circuit Court of Appeals was right when it said (R. 76) that the Commission did not have before it any question of the reasonableness of rates, and that while the existence of through routes was involved, there was no controversy as to the fact and no question decided as to the reasonableness of routes, that the question was one of law, and that while great deference will be paid to the conclusions of the Commission, the courts are not bound by them.

THE COURTS BELOW WERE RIGHT IN THEIR CONCLUSIONS THAT THE LANGUAGE OF THE COMBINATION RULE IS CLEAR AND UNAMBIGUOUS AND THAT THE INTERSTATE COMMERCE COMMISSION ERRED AS A MATTER OF LAW IN CONSTRUING THE RULE AT PLAIN VARIANCE WITH ITS LANGUAGE.

The first question that confronts us in construing the combination rule is to determine whether there were published through rates in effect on the shipments of lumber

involved in this proceeding from the points of origin of those shipments to their destinations. This is a condition to the use of the rule. We pointed out in our statement that there were such published through rates in effect.

As stated by the District Court in its opinion (R. 65), at the time the shipments involved in the complaint moved, there were in existence between the points of origin and destination on all such shipments lawfully published through rates, and the routes over which these through rates applied were not under attack as being unreasonable or impracticable.

The condition stated in the rule having been considered, and a determination reached of the question whether published through rates were in effect from the points of origin in question to destination, it follows that the rule under the plain language of the tariff may not be applied to the shipments of lumber involved in this proceeding, on all of which shipments the published through rates were in effect, applying via the originating carrier and its connections to destination.

The language of the combination rule is plain. It is unambiguous. There is not a word in the rule used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is nothing technical about the rule. It does not contain one technical word. It is clearly and simply stated in simple language.

Tariffs are not framed by lexicographers. Nor are they framed by men given to expressing their language in recondite phrases. They are framed by men who endeavor to express the purpose and intent of the rule in the plainest, simplest, clearest language possible. The language of the combination rule is characterized by clarity, simplicity and directness. The rules in tariffs must, moreover, be read

and applied by hundreds of persons whose duties require them to quote rates and collect freight charges. Where the language of a tariff rule is plain and unambiguous, the rule ought to be construed in accordance with the plain meaning of the language used. The rule ought to be construed as it would be construed by the ordinary man who is required by his daily work to construe and apply the rule. One reading of the combination rule is sufficient to disclose what it means.

What the Commission did in the construction that it placed on the combination rule was to write out of the rule the phrase "where no published through rates are in effect from point of origin to destination." The Commission had no right thus arbitrarily to write out of the tariff this qualifying phrase. The Commission may determine whether a rate or a practice or a rule is unreasonable or unjustly discriminatory or preferential or unduly prejudicial, and thus in violation of law; but when it construes a tariff rule for the purpose of determining the meaning of the rule, it must take the rule as written. It has no more power in such a case to rewrite the rule than a court, in dealing with the construction to be placed upon a statute, has the power to rewrite the statute.

It has been held by the courts that in the construction of railroad freight tariffs, as in the construction of statutes, effect is to be given, if possible, to every word, clause and sentence. (*Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.*, (C. C. A., 8) 25 Fed. (2d) 66; *Chicago Great Western R. R. Co.* v. *Farmers' Shipping Assn.*, (C. C. A., 10) 59 Fed. (2d) 657; *Updike Grain Corporation* v. *St. L. S. F. Ry. Co.*, (C. C. A., 8) 52 Fed. (2d) 94.)

The Commission by its construction of the combination rule failed to give effect not only to a word or two, but to a clause that qualifies the rule itself and limits its application.

The Circuit Court of Appeals for the Fifth Circuit in *Western Grain Co.* v. *St. L. S. F. Ry. Co.*, 56 Fed. (2d) 160, said that tariffs must be applied as written. The Commission has wholly failed to apply the combination rule as it was written and as it appears in the tariff.

A reading of the combination rule discloses that it is expressed in such clear terms that the ordinary business man can understand it, a test suggested in *Atlantic Bridge Co.* v. *Atlantic Coast Line Railroad Co.*, 56 Fed. (2d) 163.

If the language of the combination rule be construed in accordance with the meaning of the words used, words that are simple and non-technical, the construction placed by the Commission on the rule cannot be sustained.

Petitioners argue (p. 38) that any ambiguity or doubt as to the meaning of the tariff in question must be resolved against the carriers, and they cite cases which announce the rule that since the tariff is written by the carrier all ambiguity or reasonable doubt as to its meaning must be resolved against the carrier. Respondents do not dispute the correctness of this principle. But it only requires a reading of the rule to see, as the District Court found, that there is no ambiguity in the language, that it does not give rise to any reasonable doubt. The language is just as clear as a bell, and means just what it says and says just what it means.

Petitioners also argue (p. 40) that the respondents admit that something in addition to the words appearing in the rule must be read into the rule and that these words are:

> "The published through rate must apply over the line of the initial carrier."

This is precisely what the rule says. Nothing is required to be read into the rule. No words are required to be added to the words that go to make up the rule.

A shipper of lumber tenders his shipment to an agent of a railroad at the point of origin for movement to a destination in the North. Under the rule the first question the agent must determine in order to ascertain the lawful rate is whether there is a published through rate in effect from that point of origin *via that railroad* and its connections to the destination. If there is a published through rate, then the combination rule has no application. If there is no published through rate, and the through charge is made up of the combination of local rates of the carriers making up the through route, then the combination rule comes into play, and the shipper through the use of the combination rule is protected from the payment of more than one increase in the rate. The rule is simplicity itself both in its language and in its operation. Petitioners overlook the fact that the combination rule is the rule of the initial carrier as well as of other carriers that are parties to the tariff naming the combination rule, and that it is the initial carrier speaking for itself and its connections when it says that when no published through rates are in effect via its line from the point of origin, the through rate will be determined in the manner specified in the rule.

What the petitioners really sought to accomplish was to persuade the Commission to insert in the rule the phrase "via the route of movement," so that the rule would read in substance that where no published through rates are in effect via the route of movement from point of origin to destination, the rule would apply. But this is not what the rule says. The rule, and it must be borne in mind that it is the initial carrier speaking through its tariffs, says that where there are no published through rates in effect from the point of origin of the shipment tendered to the initial carrier for transportation to the destination of that shipment, the combination rate will be arrived at in the manner specified in the rule.

What this Court said in a recent case, *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, in which the court found that the Commission had misconstrued Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C., Sec. 15(4)), applies with equal force to the present case. The court there said (pp. 277-278):

> "The language of that provision (Paragraph (4) of Section 15) is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. * * *"

A reading of the combination rule discloses that its language is so clear and its meaning so plain that no difficulty attends its construction. Adherence to its terms leads to nothing impossible or plainly unreasonable. The Commission was, therefore, bound by the words employed, and was not at liberty to conjure up conditions to raise doubts in order that resort might be had to construction. Where no ambiguity exists there is no room for construction. The Commission of course has the power upon proper complaint and following a hearing to pass upon the reasonableness of not only the rates and the charges of interstate carriers, but their tariff rules, regulations and practices. But there was no such issue before the Commission in this proceeding. The Commission was not asked to pass upon the reasonableness of the combination rule or its lawfulness under any of the sections of the Interstate Commerce Act. It was called

upon only to construe the rule and to determine whether the carriers had lawfully construed and applied the rule. Construction may not be substituted for legislation.

The reasoning of the Circuit Court of Appeals on the construction of the rule, (R. 76, 77, 78) the real and fundamental point in the case, is unanswerable. These petitioners and the Commission have sought to turn simplicity in language into complexity, in the face of the fact that no complexity existed. They have sought to conjure up conditions and to raise doubts where neither conditions nor doubts existed.

The District Court was right in concluding that the combination rule was clear and unambiguous, requiring no construction (R. 66), and the Circuit Court of Appeals was right in saying (R. 76) that the language appears to be clear enough, and that there is absent any express qualification thereon. The judgment of these courts should be affirmed.

THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN BALTIMORE & OHIO RAILROAD COMPANY v. DOMESTIC HARDWOODS, INC., 65 Fed. (2d) 448, IS UNSOUND, AND THE COURTS BELOW WERE RIGHT IN REFUSING TO FOLLOW IT.

Petitioners rely upon the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 448, in which the Court of Appeals construed the combination rule as the Interstate Commerce Commission construed it. Petitioners state (p. 48) that the direct conflict between the decision of the Court of Appeals of the District of Columbia and the decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar, was the prin-

cipal ground urged in the application for the writ of certiorari.

Respondents submit that the decision of the Court of Appeals in the *Baltimore & Ohio Case* is unsound for the following reasons:

The court in the first place erred as a matter of law in construing the combination rule as it did and in upholding the construction placed by the Commission upon that rule. The plain and unambiguous language of the rule, for the reasons heretofore stated, will not permit or justify the construction placed by the Commission and the court upon the rule.

It is clear, in the second place, that the Court of Appeals of the District of Columbia felt that the decision of the Commission was controlling, and that the court should not exercise its own and independent judgment as to whether the Commission's construction of the combination rule was lawful. The court said (p. 492) that the carriers took the position that the Jones rule (the combination rule) is applicable only where there is no joint through rate via any route, that this the Commission held was not the correct interpretation, and that the court found itself in agreement with the Commission's conclusion,

> "though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would present more difficulty, for the language is undoubtedly broad enough to be construed as contended by carriers. * * *"

The court went on to say that the question involves more than the mere interpretation of words, that it really goes to the interpretation and construction of railroad rates and routing, a technical subject, and as to which the Commission is presumed to have and does have expert knowledge superior to that possessed by any court. The language of the court indicates that it treated the question as one of

complexity, notwithstanding the fact that the language used in the combination rule is plain and unambiguous, and considered the question one in which it should put aside its own judgment and accept that of the Commission.

The Circuit Court of Appeals in the case at bar said (R. 79) that the Court of Appeals followed the Commission's ruling on the theory that the question involved a technical subject on which the Commission was presumed to have expert knowledge, superior to that of the court, but that it, the court below, perceived no inherent technical question in determining whether the rule means what it says.

The Court of Appeals then set forth some reasons why in its opinion the Commission's construction of the combination rule was not strained, unreasonable, or unnatural (p. 492). An analysis of these reasons will show that each one of them is unsound.

The court said it is conceivable that a through rate might be established covering a route several hundred miles longer than some other route, or over a route through congested centers, the use of which would delay the shipment. But there was no contention in the *Baltimore & Ohio Case* or in the present proceeding that the through, single-factor routes that had long been established in such numbers and over so many different routes applied over routes that were unreasonably long.

The court further said that if the shipment be conceived of as perishable, this through rate would obviously not be available for such class of shipment, and that in such a case to say that because of this unusuable through rate and route the rule which would otherwise apply would not apply would be an anomaly.

There is no question in this case, nor was there such a question in the *Baltimore & Ohio Case,* of rates applying on perishable freight, or the reasonableness of the routes

over which such rates applied. The court in its efforts to suggest reasons to support the Commission's construction of the combination rule, has overlooked the fact that if the through routes maintained by the carriers over which the through, single-factor rates are now in effect are unreasonably long, whether or not the shipment be perishable, the Commission has the power to require the carriers to establish additional through routes whenever such routes are found necessary or desirable in the public interest, and the power to fix the rates via such routes (Paragraph (3) of Section 15 of the Interstate Commerce Act, 49 U. S. C. A. Sec. 15 (3)).

The court also overlooked the fact that the question presented was not whether the routes over which the published through rates applied were unreasonably long, or applied through congested centers, a question wholly addressed to the administrative powers of the Interstate Commerce Commission, but whether the Commission's construction of a written tariff rule was justified by the language of the rule itself.

The court also said that the combination rule was created and adopted to avoid inequality as well as excessive rates, and to maintain a harmonious rate adjustment, that without it shippers using the combination rates would be required to pay more ordinarily than those who were able to use the through rates, and that the rule thus avoided this inequality. But the court, in upholding the Commission's construction of the rule, thwarted the very purpose of the rule as stated by the court.

The court was right when it said that without the rule, shippers using the combination rates would be required to pay more ordinarily than those able to use the through rates. The court overlooked this controlling fact: that the shippers had published through rates from the points of

origin from which their shipments were made. The rule was not intended to protect shippers who, to use the court's language, "were able to use the through rates." It was intended to bring about an equality in so far as advances in rates were concerned between shippers who had available published through rates from the points or origin from which their shipments were made, as had the petitioners in the case at bar, and whose rates, therefore, included but one increase, and shippers located at points of origin from which no published through rates were in effect and who, in the absence of the combination rule, would have been required to pay an increase in each factor of the combination rate. If there were three factors making up the combination rate, the shipper would have been required to pay a triple advance as compared with a single advance only in the case of the shipper who had published through rates from his point of origin. It was, therefore, a distortion of the plain and unambiguous language of the rule to apply it for the benefit of those shippers, to use the language of the Court of Appeals of the District of Columbia, "who were able to use the through rates." This construction destroys the very equality that the rule was intended to accomplish.

Moreover, the rule as construed by the Commission and the Court of Appeals of the District of Columbia establishes the very inequality that the court in the *Baltimore & Ohio Case* said the rule was created to avoid. It destroys harmony in the rate adjustment. We point out elsewhere in this brief that under the rule as construed by the Commission, a shipper at an intermediate point nearer the destination would actually pay a greater rate than the shipper located at the more distant point, thus creating violations of the long-and-short-haul clause of Section 4 of the Inter-

state Commerce Act. What equality, for example, can there be in construing the combination rule in such a way as to enable a shipper located at Laurel, Miss., to transport his shipments to Columbus, Ohio, at a rate of 40½c, while a shipper of the same commodity located at Ackerman, an intermediate point and a point nearer to Columbus, forwarding his shipments over the same line or route, would pay a rate of 41½c? (R. 61).

It is clear that the court in this case has facts before it which distinguish the case from the *Baltimore & Ohio Case,* and throw an entirely different light on the question as to how the combination rule should be construed. The court in that case did not have before it facts which showed that the combination rule as construed by the Commission would have resulted in violations of the long-and-short-haul clause of Section 4 of the Act, and had no occasion theretofore to consider the principle announced by the Supreme Court in *Great Northern Ry. Co.* v. *Delmar Co.,* 283 U. S. 686. These facts alone distinguish the *Baltimore & Ohio Case* from the present case.

The court in the *Baltimore & Ohio Case* also said (p. 492) that if the establishment of a through rate made the combination rule ineffective, as the carriers contended it did, the carriers could in all cases of combination rates avoid the rule by establishing a through rate impossible in practical use, that the Commission who knew about such matters had avoided this result by refusing to allow it to be done, and that nothing presented to the court impelled it to a contrary view.

The court here overlooks the fact that the Commission did not have before it any issue respecting the reasonableness of the routes, their length, circuity, or the number of

carriers participating in them or of the published through rates. No issue was raised which called for the administrative discretion of the Commission with respect to the establishment or maintenance of routes or their reasonableness.

But assume that the carriers sought to establish a through rate impossible in practical use. Would the remedy of the shippers be found in the combination rule? Not at all. The court in suggesting this particular reason wholly overlooked the power that the Interstate Commerce Commission possesses under Paragraph (3) of Section 15 of the Act (49 U. S. C. A. Sec. 15 (3) Appendix A) to establish through routes whenever it finds such through routes necessary or desirable in the public interest and to fix the rates, as well as the power under Paragraph (7) of the same section (49 U. S. C. A. Sec. 15 (7)) to suspend any new individual or joint rate pending the Commission's investigation as to its lawfulness. The court dealt with the case as if it involved the reasonableness *per se* of the combination rule. The court overlooked the fact that the case did not call for the exercise of the administrative discretion of the Commission, and that the case presented the sole question of the proper interpretation of the language in the combination rule, a question of law alone.

The court in the *Baltimore & Ohio Case,* to paraphrase the language of the Supreme Court in *United States* v. *Missouri Pacific R. R. Co.,* 278 U. S. 269, in which the court held that the construction placed by the Commission upon Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (4)) was erroneous, conjured up conditions to raise doubts in order that resort may be had to construction, when the language was so clear that there existed no room for construction. (pp. 277-278).

Respondents submit that the decision in the *Baltimore & Ohio Case* is not conclusive of the case at bar, that when that decision is examined in the light of the facts in that case and the reasons given by the court for its opinion therein, and in the light of the facts in the case now before this court, it will be found that the court did not lawfully construe the rule, and that there are facts in the case at bar which distinguish it from the *Baltimore & Ohio Case.*

It will be seen from the foregoing that the Circuit Court of Appeals in the case at bar was right in its refusal to follow the reasoning of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case.* The court below pointed out (R. 78) that the Court of Appeals in the *Baltimore & Ohio Case* overlooked the fact that the power of the Commission over reasonable rates did not lie in the combination rule but in the power of the Commission to establish routes and to fix rates under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3)).

This point was recognized by the recent decision of the Circuit Court of Appeals for the Second Circuit construing another portion of the combination rule,[1] in which that court said (p. 115):

> "* * * If the sum of the individual rates of the several carriers made an unreasonable charge for the carriage, the Commission had ample power, either upon complaint or upon its own initiative, to establish through rates, joint classifications and joint rates, and to provide for division of the charges between the carriers. (49 U. S. C. A. Sec. 15 (3))."

Respondents submit that the courts below were right and that the Court of Appeals in the *Baltimore & Ohio Case* was wrong in the construction placed upon the combination rule.

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(1) *Hygrade Food Products Corporation* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2nd) 113.

THREE CIRCUIT COURTS OF APPEAL HAVE RECENTLY HELD THAT THE INTERSTATE COMMERCE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO CONSTRUE ANOTHER PORTION OF THE COMBINATION RULE IN ACCORDANCE WITH THE LANGUAGE USED.

Three different circuit courts of appeal have recently held that the Interstate Commerce Commission erred as a matter of law in failing to construe another portion of this same combination rule in accordance with the plain meaning of the language used. The Commission in the three cases that were the subject of these suits did precisely what it did in the case at bar: it failed to construe the language of the rule in accordance with the meaning of the words used. It failed to apply a plain and unambiguous tariff rule as that rule was written. The court in each case set forth the pertinent provisions of the combination rule and its purpose.

One of the limitations attached to the use of the combination rule, as shown by these decisions, is that it may be used only when the tariffs naming the freight rates themselves provide that those rates are subject to the rule. There is no question in the case at bar with respect to this particular limitation attached to the use of the combination rule.

Notwithstanding the plain language contained in this limitation, the Commission held in a long line of cases that the combination rule applied to the construction of rates over two or more carriers where no published through rate was in effect, if the tariff of one carrier alone contained a reference to the combination rule.

The Commission so held in the case of *Hohenberg* v. *Louisville & Nashville R. R. Co.*,[1] and awarded reparation based on its construction of the rule. The carriers refused to pay the award and Hohenberg brought suit on the award.

(1) 112 I. C. C. 325; 118 I. C. C. 157; 153 I. C. C. 402.

The Circuit Court of Appeals for the Fifth Circuit, however, in affirming a judgment in favor of the defendant carriers, said in part (*Hohenberg* v. *Louisville & Nashville R. R. Co.*, 46 Fed. (2d) 952, p. 955) :[2]

> "Turning then to the construction of the tariff in controversy, which hinges upon the applicability of the Jones-Kelley rule, *it is apparent from reading the rule* that it is not applicable except to rates contained in the tariffs where specific reference is made to it.
> * * * As the cotton was shipped out under a tariff that made no reference to the Jones-Kelley rule, and did not contain the 18-cent increase, the rule is not applicable." (Italics ours.)

The court here construed the language of the rule just as it read.

Precisely the same question was before the Circuit Court of Appeals for the Eighth Circuit in *Wheelock et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415. The court quoted what we have just quoted from the decision in the *Hohenberg Case*, and said that it was in full accord with the views expressed therein, and that it would seem clear that the combination rule was not intended to be applied unless all factors of the combination were subject to the tariff.

The court in significant language called attention to the fact (p. 418) that the plaintiff—

> "was chargeable with notice of the provisions of all applicable tariffs, and hence it knew, in contemplation of law, that only the tariff of the initial carrier made reference to the Jones tariff. It knew that the connecting carriers were not parties thereto, and the Jones tariff itself gave notice that it was applicable only where the railroads, by appropriate powers of attorney or by concurrence in tariffs referring to the Jones tariff were subject to the provisions of that tariff. It had notice of all the rules and provisions contained in the Jones tariff."

This language has equal application to the petitioners in

(2) Certiorari denied, 284 U. S. 617.

the case at bar. Petitioners were chargeable under the law with notice of the provisions of all the tariffs applying on their shipments of lumber. They knew that the combination rule by its very terms, and by a condition written into the rule itself, could not be applied where published through rates were in effect from point of origin to destination. They knew that the purpose of the rule was to protect shippers who were located at points of origin from which there were no published through rates in effect. Published through rates were in effect from the points of origin from which petitioners made their shipments. They knew that if they routed their shipments from these points of origin over routes over which the published through rates did not apply, they would under the plain terms of the combination rule be required to pay the sum of the local rates, unaffected by that rule. They forwarded their shipments over the routes over which the combination basis of rates applied, in the face of the fact that they had lower published through rates in effect via the originating lines from the same points of origin to the same destinations. They were not misled or deceived by the language of the combination rule. What they sought to do was to obtain a construction of the rule wholly at variance with the purpose of the rule and without any support in the language of the rule. They made no effort to prove that the published through rates were unreasonable *per se*. They sought by a strained and forced construction of the combination rule, wholly unjustified by the language used, to obtain a lower rate than the published through rate.

And lastly we have the very recent decision of the Circuit Court of Appeals for the Second Circuit in *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al.*, 85 Fed. (2d) 113, in which the court again had presented to it the very same question as that presented in the *Hohenberg* and the *Walsh*

Fire Clay Products Company cases, and where it said that for the reasons given it had reached the same conclusion.

Petitioners in dealing with these cases say (p. 52) that they presented clearly a question of law, involving no question of fact or administrative policy, and that they are in no way in point here.

But this Court will see from an examination of these three cases that while they did not involve the construction of that part of the combination rule here under consideration, these three courts were called upon to do what the courts below in the case at bar were called upon to do: to construe a tariff rule the words in which were used in their ordinary sense. These three Circuit Courts of Appeals held that the Commission erred as a matter of law in failing to construe that part of the combination rule there under consideration in accordance with the meaning of the language used.

These respondents submit that the principle applied by these three Circuit Courts of Appeal that the rule should be construed in accordance with the plain meaning of the language used, has equal application to this case. When that principle is followed it will be seen that the decisions of the courts below in the case at bar were right.

THE FACT THAT THE INTERSTATE COMMERCE COMMISSION HAS LONG CONSTRUED THE COMBINATION RULE AS IT DID IN THE CASE AT BAR IS NOT CONTROLLING WHERE THAT CONSTRUCTION IS CONTRARY TO THE PLAIN MEANING OF THE RULE.

THE QUESTION BEFORE THE COURT IS NOT WHAT CONSTRUCTION THE CARRIERS OR SOME OF THEM AT ONE TIME PLACED UPON THE COMBINATION RULE, BUT THE LAWFUL CONSTRUCTION OF THAT RULE.

Petitioners argue (p. 30) that the construction placed by the Commission upon the combination rule should be sustained because this construction has long been followed and has become a settled administrative construction. Cases are cited to the effect that an administrative ruling giving a practical interpretation of an ambiguous or doubtful statute will not be disturbed except for the most cogent and weighty reasons where, as here, the ruling has long been adhered to.

Petitioners cite a long list of cases in which the Interstate Commerce Commission construed the combination rule as it construed it in this case. But these cases only illustrate the long continued opposition of these respondents to the construction placed by the Commission upon the rule. The first of these decisions cited by petitioners, *McGowan-Foshee Lumber Company* v. *A. F. & G. Ry. Co.*, 95 I. C. C. 451, was decided as far back as January 12, 1925 and involved a shipment moving in 1921.

These respondent railroads, as can be seen from a review of the cases, have consistently and persistently opposed the construction placed by the Commission upon the combination rule, believing it to be wrong as a matter of law.

The courts below upheld the contentions of these respondents that the language of the combination rule was clear (R. 66, 76). These respondents submit, therefore,

that the principle urged by the petitioners has no application. As stated by this Court in *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269, in which the Court found that the Commission has misconstrued Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (4)), it is elementary that where no ambiguity exists, there is no room for construction, that courts are bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction (p. 278).

This Court said in the case just cited that it has been held in many cases that a definitely settled administrative construction is entitled to the highest respect, and if acted upon for a number of years will not be disturbed except for cogent reasons, but that the rule does not apply in cases where the construction is not doubtful (p. 280).

Petitioners refer (p. 34) to the amendment to their petition in which they state that for several years after 1920 the rail carriers applied the combination rule to shipments of lumber from the South, that in 1923 the southern railroads for the first time took the position that the rule did not apply in cases where there was a through rate by any route, and undertook to amend their tariffs to specifically so provide, but the Commission declined to permit such an amendment.

Petitioners state that on demurrer this allegation must be taken as true, and they refer to what the Commission said in its report in *Cancellation Rule for Combination Rates on Lumber,* 93 I. C. C. 614 (decided December 2, 1924), that both the carriers and the shippers in the past had put a different construction on the application of the rule from that there contended for by the carriers.

The carriers, ever since the rule has been in effect, have of course applied the rule to shipments of lumber where

the rule by its language was applicable. Whether some of the carriers at one time construed the rule at variance with the plain and clear language of the rule is immaterial.

As just stated, petitioners themselves cite a long list of cases in which the railroads have persistently over a period of many years questioned the construction placed by the Commission on the combination rule, and insisted that the rule should be construed as the respondents here contend it should be construed and as the court below found it should be construed. The earliest of these cases was decided as far back as January, 1925, and involved a shipment moving in 1921.

The Commission itself had said that the fact that for approximately twenty-five years carriers and shippers have interpreted a tariff uniformly, is not conclusive that the interpretation is correct, but is entitled to consideration (*Thames & Co.* v. *Chesapeake & Ohio Ry. Co. et al.*, 194 I. C. C. 188, p. 189). The Commission has also said that a reasonable doubt concerning the meaning of transit tariffs warrants the interpretation which has been placed upon them by the parties (*Parkersburg Rig & Reel Co.* v. *Chicago & Northwestern Ry. Co.*, 198 I. C. C. 709, p. 712). But here no reasonable doubt can arise with respect to the meaning of the combination rule. An unlawful construction by either carriers or shippers of a tariff rule, plain and unambiguous in its language, does not make such construction by either shippers or carriers the lawful one. The question here before the court is whether the language of the combination rule admits of any possible ambiguity. The court here has before it a tariff rule which, as the courts below found, is clear and unambiguous and should under such circumstances be construed as written.

As stated by the Circuit Court of Appeals in its opinion (R. 77):

> "Freight tariffs must * * * be applied as written * * * and effect must be given to every word, clause and sentence. * * * The practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument. * * * Where there is no occasion for construction, the court will be less hesitant to overturn a prior understanding even though it may have been acted upon for many years."

The court then cited the opinion of this Court in *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, p. 280.

A longer list of decisions of the Interstate Commerce Commission might be cited[1] in which that Commission construed another part of the combination rule in such a way as to lead three different Circuit Courts of Appeals[2] to reach the conclusion that the Commission erred as a matter of law. And those three Circuit Courts of Appeals reached

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(1) *Combination Rates on Agricultural Limestone*, 78 I. C. C. 579.
Combination Rule on Lumber, 93 I. C. C. 279.
Continental Oil Co. v. *Director General*, 109 I. C. C. 289.
Ladd Lime & Stone Co. v. *L. & N. R. R. Co.*, 109 I. C. C. 251.
Calif. Cotton & Factorage Co. v. *Director General*, 109 I. C. C. 293.
Thompson, Weinman & Co. v. *N. Y. N. H. & H. R. R. Co.*, 112 I. C. C. 65.
Montgomery Cotton Exchange v. *L. & N. R. R. Co.*, 118 I. C. C. 157.
Dann-Gerow Co. v. *A. C. L. R. R. Co.*, 120 I. C. C. 123.
Armour & Co. v. *C. & N. W. Ry. Co.*, 120 I. C. C. 737.
Allen Gravel Co. v. *C. R. I. & P. Ry. Co.*, 123 I. C. C. 650.
Wash. Building Lime Co. v. *B. & O. R. R. Co.*, 126 I. C. C. 9.
Potosi Tie & Lumber Co. v. *S. & E. R. R. Co.*, 128 I. C. C. 41.
Standard Oil Co. v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 297.
Wisconsin Lime & Cement Co. v. *A. T. & S. F. Ry. Co.*, 148 I. C. C. 599.
Vogt & Sons v. *C. B. & Q. R. R. Co.*, 181 I. C. C. 152.
Schofield Bros. v. *A. A. R. R. Co*, 159 I. C. C. 339.
Schimmel v. *B. & O. R. R. Co.*, 171 I. C. C. 791.
Ashby Veneer & Lumber Co. Inc. v. *D. & R. G. W. R. R. Co.*, 200 I. C. C. 472.

(2) *Hohenberg* v. *L. & N. R. R. Co.*, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415; *Hygrade Food Products Corporation* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2nd) 113.

this conclusion notwithstanding the long line of cases in which the Commission had held to the contrary.

Petitioners argue (p. 31) that a reversal of this long established administrative construction by the Commission would produce inconvenience and result in inequality, thereby destroying the uniformity which this Court has said is the paramount purpose of the Interstate Commerce Act, and that if the Court applies the rule that consideration should be given as to how the tariff would operate as a matter of justice, the construction by the Commission must be sustained.

These respondents submit that the petitioners are in no position to urge any such contentions. The purpose of the combination rule was to protect shippers who were shipping lumber from points from which no published through rates were in effect and who, had it not been for the combination rule, would have been required to pay double and sometimes triple increases in their rates, while their competitors, located as petitioners were at points from which published through rates were in effect, would have been required to pay but one increase in their rates. Petitioners, therefore, did not need the protection of the combination rule. Having published through rates in effect from all the points of origin from which their shipments were made, they paid but one increase in the total rate.

The fact of the matter is that petitioners are here seeking to turn a rule which was intended as a shield to protect those shippers located at points of origin from which no published through rates were in effect from double and triple increases in their rates, into a sword to enable petitioners, through a strained and forced construction of the combination rule, to obtain lower rates than the published through rates, the reasonableness of which they dared not attack in this proceeding, and the reasonableness of which

when they did attack them, was upheld by the Commission (*Southern Pine Assn.* v. *A. & W. R. R. Co.*, 183 I. C. C. 191). The construction which petitioners seek to give to this rule, to use the language of the Court in *Hohenberg* v. *Louisville & Nashville Railroad Company*, 46 Fed. (2d) 952, (p. 955):

> "* * * would do violence both to the letter and intent of the rule and produce wholly inequitable results."

Petitioners here ask this Court to approve a construction of the combination rule under which these petitioners, all shipping lumber from points of origin from which published through rates were in effect, allegations with respect to the reasonableness of which rates petitioners withdrew at the hearing in this case (R. 42), would obtain reductions in those published through rates. Such a construction would result in the petitioners paying less than the single increase in the published through rates, while their competitors at other points from which points published through rates were not available, would pay one increase in full.

The published through rate on lumber from Laurel, Mississippi to Columbus, Ohio, for example, was 43 cents (R. 56). Petitioners do not attack the reasonableness *per se* of this rate (R. 42). This rate of 43 cents reflected but one increase in the total through rate. But if petitioners are right in their construction of the rule, this published through rate of 43 cents would be reduced to 40½ cents (R. 57). Petitioners' competitors located at points from which no published through rates were in effect would pay in full the single increase in the rate, while petitioners by this strained and forced construction of the rule would obtain a reduction in their rate.

It can readily be seen that if this case is to be decided on the question of how the rates claimed will operate as a matter of justice, as urged by the petitioners, the construction of the rule for which these respondent carriers

have contended all these years should be upheld. Justice will not be done if the rule is construed otherwise than in accordance with the plain meaning of the words used in the rule.

Petitioners go on to say (p. 33) that under the construction contended for by these respondents, if a shipper used the combination rate, in many cases he would pay double increases, and that if he shipped by the route via which the published through rate applied, he would be deprived of the use of routes which all agree are reasonable routes. No shipper would pay double increases provided he routed his shipments via routes over which the published through rates applied, for those published through rates included but one increase. That the routes over which the published through rates applied were ample in number is shown by the fact (R. 56) that from Laurel, Mississippi to Columbus, Ohio, there were 150 different routes over which the published through rate of 43 cents applied. These petitioners never contended before the Commission that the routes over which the published through rates applied were insufficient in number or inadequate for some reason or other. If the petitioners believed that an additional number of through routes should be established over which the published through rates applied, they could have invoked the power that the Commission possesses under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3)) to establish through routes when it finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes. Petitioners raised no such issue.

The Court will see that the case before the Commission did not involve any question of the reasonableness of the routes or the exercise by the Commission of its power under Paragraph (3) of Section 15 to require these respondent railroads to establish through routes. The case as pre-

sented by these petitioners involved but one question alone: the proper and lawful construction to be given a rule in a railroad freight tariff.

THE CONSTRUCTION PLACED BY THE INTERSTATE COMMERCE COMMISSION UPON THE COMBINATION RULE WOULD HAVE RESULTED IN VIOLATIONS OF THE LONG-AND-SHORT-HAUL CLAUSE OF SECTION 4 OF THE INTERSTATE COMMERCE ACT, AND WAS THEREFORE UNLAWFUL.

For the reasons stated elsewhere in this brief, respondents submit that no doubt arises with respect to the construction to be placed upon the combination rule. The language of the rule is clear and unambiguous. It is to be construed and applied just as it reads. But if it be assumed that any possible doubt can arise with respect to the meaning of the rule, and that the rule is capable of two possible constructions, then it is clear under a recent decision of this Court that the Commission erred in adopting that construction of the rule which would have resulted in a violation of law.

In *Great Northern Railway Co.* v. *Delmar Co.*, 283 U. S. 686, the Court had before it an order of the Interstate Commerce Commission awarding reparation against the Great Northern Railway Company for overcharges on interstate shipments of grain from points in western States to Superior, Wisconsin. The Great Northern had two routes from the points of origin to Superior, the shorter route via Willmar, Minnesota, and the longer route over which the cars in question traveled, via Minneapolis, Minnesota. Through rates were in effect from these points of origin to Superior, which rates were not restricted to apply via any particular route. The Great Northern took the position that when the shipments moved via Minneapolis, the longer route, the tariff should not be construed so as to render the through rate applicable via Minneapolis, but that the law-

ful rate was made up of the combination of the local rates on Minneapolis, which combination was higher than the through rate.

The Commission, however, sustained the contention of the Delmar Company that the through rates applied to the shipments routed via Minneapolis as well as those routed Willmar, since the tariff did not expressly restrict their application to the shorter and more direct route via Willmar. The Commission held that overcharges had been collected and awarded reparation. The application of the through rates to shipments moving via Minneapolis resulted in violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act (49 USCA Sec. 4), in that the rates from the points of origin to intermediate points on the same line or route were greater than the rate to the more distant point, Superior.

This Court said in its conclusion (pp. 690-691):

> "The railway can transport the shipments over the shorter and customary route without violating Section 4; but if the tariff is construed to require it to take them over the longer route it must violate that section and incur the resulting penalties. In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. Compare *Wilson* v. *Rosseau*, 4 How. 646, 685; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *In Re Rose Co.*, 275 Fed. 409; *Northern Pac. Ry. Co.* v. *St. Paul & Tacoma Lumber Co.*, 4 Fed. (2d) 359.
>
> The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion."

Let us apply the principle announced in this case to the facts in the present proceeding.

Respondents in the amendment to their answer (R. 60,

61) set forth instances of how the construction placed by the Commission on the combination rule would have resulted in violations of the long-and-short-haul clause of Section 4. If the Commission had construed the rule as the carriers contended it should be construed, no such violations of law would have resulted. The Commission itself in its report (R. 47) refers to the contention of the respondents that, if the tariffs had been applied as the petitioners contend, violations of the long-and-short-haul clause of Section 4 would have resulted, and the Commission itself gives an example of how these violations would have been brought about (R. 47).

All the facts were before the Commission. It had the choice of construing the combination rule in such a way as to avoid violations of the long-and-short-haul clause. It failed to do so. The decision of the Supreme Court in the *Delmar Case* makes it plain that in failing to do so the Commission erred.

Petitioners seek to avoid the effect of this decision by arguing (p. 43) that if the application of the combination rule results in violations of the Fourth Section in cases where there is a joint through rate from the same point of origin, it would necessarily result in a like violation in instances where there is no joint through rate from the point of origin, in which latter case the railroads admit that the combination rule applies, and that thus the contention of the railroads would destroy the rule in its entirety. There is nothing in the record that supports this contention, and a check of the tariffs shows that it is without any foundation in fact. The Commission's report does show on its face, as heretofore pointed out, that the application of the combination rule in accordance with the contentions of the petitioners, contentions that were sustained by the Commission, would have resulted in violations

of Section 4 (R. 47). It follows, therefore, that the decision in *Chicago Great Western Railroad Company* v. *Farmers' Shipping Company,* 59 Fed. (2d) 657, cited by petitioners, in which the court said that the argument there made was of little force because either construction of the tariff rule would result in a violation of Section 4, is not in point.

Petitioners furthermore seek to distinguish the *Delmar Case* and to overcome its plain effect by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Beaumont, Sour Lake & Western Railway Company* v. *Magnolia Provision Company,* 26 Fed. (2d) 72. In that case the carriers, through an oversight or error on the part of either a printer or a clerk, had actually published in their tariffs in figures a rate of 23c. The carriers intended to publish a rate of 70c. The court was not called upon to construe the language in a tariff rule for the purpose of determining its meaning and ascertaining the lawful rate. The rate actually named in the tariff was 23c, and the Interstate Commerce Commission, as well as both the District Court and the Circuit Court of Appeals held, and very properly so, that proof of error in publishing the amount of the rates does not justify departure from the rate as actually published, even though the shippers had full knowledge that the rate was published by mistake and even though the published rate violated the long-and-short-haul clause of Section 4.

The question that was before the Commission and is now before the court in this proceeding is entirely different. The court is called upon to construe the language contained in a rule in the tariff in order to determine the lawful rate, and in construing the language of the rule, even if it be assumed that two constructions are possible, preference should be given to that construction which does not result in a violation of law.

Neither court below dealt with this point, the District Court stating (R. 66) that as the tariff is clear and unambiguous and is susceptible of only one meaning when the language thereof is given its ordinary and usually accepted meaning, there arises no occasion for the application of those aids to construction of statutes and rate tariffs resorted to by courts in those cases where the language is ambiguous or susceptible of more than one meaning.

The point we here make is that if, notwithstanding the plain meaning of the words used in the rule, two possible constructions could be suggested, the decision in the *Delmar Case* requires that the rule be construed in such a way as to avoid a plain violation of the law.

Petitioners in concluding their discussion of the point here considered, argue (p. 45) that the rule as construed by respondents would be clearly unlawful because in violation of Paragraph (1) of Section 6 of the Interstate Commerce Act (49 USCA, Sec. 6 (1)). This is the section that requires every common carrier to file with the Commission, print and keep open to public inspection its schedules showing its rates, fares, and charges for the transportation between different points on its own route and between points on its own route and points on the route of any other carrier, and requiring, furthermore, that the schedules shall plainly state the places between which the property shall be carried, and shall contain the classification of freight in force, and shall state separately all charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of the aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

Petitioners refer to the Commission's decision in *Can-*

cellation Rule for Constructing Combination Rates on Lumber, 93 I. C. C. 614, in which the Commission said that a serious objection to the tariff provision therein proposed was that it did not fully conform to the requirements of Section 6 of the Interstate Commerce Act, in that the restriction proposed made necessary a search of other tariffs in order to determine whether there were joint rates over any route before it could be determined whether the combination rule was applicable. Petitioners argue that the construction placed upon the rule by these respondents and by the courts below would result in violations of Paragraph (1) of Section 6 of the Act.

But the Court will see when it examines the report of the Commission that the Commission did not hold that the combination rule was an unlawful rule, that the Commission did not hold that the construction placed by these respondents upon the combination rule would result in the tariffs not conforming to Paragraph (1) of Section 6 in violation of that paragraph. The Commission construed only the language in the rule and found that the rule should be construed as these petitioners contend it should be construed. The Commission itself said in its first report (R. 42) that the alleged misrouting was dependent upon the question of tariff interpretation, and that that question presented the principal issue for determination. The question passed upon by the Commission was the meaning and application of the language used in the rule and not whether the tariff in question failed to show the rates, the places between which the property would be hauled or carried, and all privileges or facilities granted, and any rules or regulations which in any wise might change, affect or determine any part or the aggregate of the rates or the value of the service rendered by the shipper.

It is perfectly apparent from a reading of the Commission's reports in this case (R. 40, R. 13) that these

petitioners did not attack the lawfulness *per se* of the rule but attacked the construction placed by these respondents upon the language of the rule.

There is not the slightest suggestion in the record here before this Court that the petitioners ever contended before the Commission that they or any of them had any difficulty in determining whether there were published through rates applying on their shipments of lumber, and consequently in determining whether the combination rule applied. They knew that there were published through rates in effect from the stations from which they made the shipments involved in this case. They knew what the rates were. What they sought to do was to obtain such a strained and forced construction of the combination rule as would enable them to reduce the published through rates, the allegations with respect to the reasonableness *per se* of which rates they withdrew at the hearing with an exception not material here (R. 42).

The only thing that the petitioners asked the Commission to do was to construe the language used in the combination rule and to determine whether the rates collected by these respondents exceeded the lawful rates. The petitioners themselves stated in their petition in the District Court (R. 8) that the damage was caused by violations of the Interstate Commerce Act and "resulted from straight overcharges and/or misrouting."

We have heretofore pointed out as the Commission itself found (R. 42) that the alleged misrouting was dependent upon the question of tariff interpretation.

It will be time enough to consider whether the combination rule that has been in the tariffs since 1918 is unlawful and in violation of Paragraph (1) of Section 6 in that the tariff containing the rule does not show the rates, plainly state the places between which property will be carried,

and any rules which change, affect or determine any part of the rates or the value of the service, when the Commission in a case involving that precise question has passed upon the question. The Commission did not do so in the case at bar. It only construed the language used in the combination rule. This was all the petitioners asked the Commission to do, and they can not convert the case that they made before the Interstate Commerce Commission into a different kind of a case involving a different issue when they get into the courts.

Conclusion.

The language of the combination rule is characterized by such directness, clarity, and simplicity, its meaning is so clear, it is so wholly lacking in any ambiguity that, to use the language of this court in *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269, there is no room for construction. The construction placed upon the rule by the Commission is at variance with its plain language and clear meaning.

The District Court and the Circuit Court of Appeals in their opinions in the case at bar (R. 65, 74) have each made an accurate and concise summary of the case and of the principles that should control its disposition.

These respondents respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A.

Paragraph (3) of Section 15 of the Interstate Commerce Act reads as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this part shall be subject to the laws and regulations applicable to transportation by water."

APPENDIX B.

Paragraph (7) of Section 6 of the Interstate Commerce Act reads as follows:

> "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

SUPREME COURT OF THE UNITED STATES.

No. 100.—October Term, 1936.

W. P. Brown & Sons Lumber Co. et al., Petitioners, *vs.* Louisville & Nashville Railroad Co.	On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 4, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

W. P. Brown & Sons Lumber Co. and other shippers brought in the Interstate Commerce Commission a complaint under Section 16 of the Interstate Commerce Act, seeking reparation for alleged overcharges on shipments of lumber and other forest products taking lumber rates. They were awarded damages in the proceedings known as *Wausau Southern Lumber Co. . Alabama Great Southern R. R. Co.*, 142 I. C. C. 521; 182 I. C. C. 731. The Louisville & Nashville Railroad and some other carriers refused to comply with the order. Then this suit was brought in the federal court for western Kentucky to recover the amounts awarded against them. The case was heard on demurrers to the amended petition and to certain paragraphs of the amended answer. The demurrer to the petition was sustained, and that to the answer overruled, on the ground that the award was founded upon an erroneous construction of the so-called "Jones" or "Combination Rule" in the tariffs. The parties declining to plead further, judgment was entered dismissing the petition, 7 Fed. Supp. 593. That judgment was affirmed by the Circuit Court of Appeals, 82 F. (2d) 94. We granted certiorari (299 U. S. —) because of conflict with the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio R. R. Co.* v. *Domestic Hardwoods, Inc.*, 65 F. (2d) 488.

The shipments involved were from points in the South and Southwest to points North. For such shipments there have long been commonly available over connecting lines more than one, and often many, through routes from each point of origin to destination. The Interstate Commerce Act does not require that the rates on all routes shall be the same. Nor does it require that there be on

each route a joint through rate. Sometimes, none of the tariffs for the several available routes specifies a joint through rate. Where no joint rate is specified, the tariffs for the through routes commonly provide that the through rate shall be the sum of the local rates of the several carriers contributing to the movement.[1] In 1918, the Director General of Railroads made, by General Order No. 28, a percentage increase of lumber rates in southern territory, limited to 5 cents per 100 pounds. Thus, a joint through rate could not be increased more than 5 cents. But when the lumber moved on a combination through rate, the 5-cent limit was applied to each factor in the combination. The result was that on combination through routes the increase was often doubled, or tripled. To avoid such a result, the so-called "Jones" or "Combination Rule" was devised in February, 1919. Ever since, it has been commonly incorporated in tariffs.[2]

The question for decision is whether the "Combination Rule" applies to the shipments here involved. If it does not, there is no cause of action. If it does, the award was correct. The rule provides:

"Where no published through rates are in effect from point of origin to destination on Lumber . . . , carloads, and two or more commodity rate factors . . . are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner . . . " [Then follows a formula.]

When applied to the combination rate specified in the tariff, the formula effects a reduction thereof. While the combination rate itself is ordinarily, if not always, higher than the joint through rate, the effect of applying to it the Combination Rule would not

[1] Section 6, (1) of the Interstate Commerce Act provides: "If no joint rate over the through route has been established, the several [connecting] carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." Concerning through rates, see St. Louis Southwestern Ry. Co. *v.* United States, 245 U. S. 136, 139, 140, note 2.

[2] B. T. Jones' Tariff 228, I. C. C. U. S. 1, Section 4. In Wausau Southern Lumber Co. *v.* Alabama Great Southern R. R. Co., 142 I. C. C. 521, 524, the Commission states: "The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect."

necessarily produce equality in rates on the several routes. It might make the combination through rate lower than the published joint through rate. This is true as to many of the shipments here involved. The amended answer gave an example: Laurel, Mississippi, is a typical lumber shipping point; and Columbus, Ohio, a typical destination. The published through joint rate from Laurel to Columbus, applying via each of the several originating carriers at that point, was [illegible] cents per 100 pounds. A combination rate for the movement over other routes, unaffected by the Combination Rule, was 43½ cents. If the combination rate were subjected to the Combination Rule, the rate over the combination route would be 40½ cents. Thus the combination rate would be much less than the published joint through rate.

Each of these shipments here involved might have been made over a route for which a joint through rate from point of origin to destination had been published. Instead, the shipment was made over a route for which the rate specified in the tariff was a combination rate. In some instances the route had been designated by the shipper.[3] The carriers exacted the full combination rate. The shippers made reclamation, on the ground that the Combination Rule applies in every case where no joint through rate has been published over the route selected for the movement. The Commission sustained the shippers' claim.

First. The rule declares that the prescribed formula is to be applied "where no published through rates are in effect from point of origin to destination." The language used is not technical. The meaning of the words is clear. There is no ambiguity. The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms, has no application. We so hold despite the construction given to the rule by the Commission.

[3] In some instances the claim rests upon a charge of misrouting. That is, the route not having been designated by the shipper, it was the duty of the initial carrier to select the route over which the rate was lowest. Compare Northern Pacific Ry. Co. *v.* Solum, 247 U. S. 477, 482. The carrier did not fail in that duty unless the Combination Rule applied. That is, there was no misrouting if the Commission's construction was erroneous.

Second. The shippers contend that the construction given to the rule by the Commission is conclusive, because preliminary resort to the Commission was necessary. *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co., Ltd.*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43; *Northern Pacific Ry Co.* v. *Solum*, 247 U. S. 477. They argue that such preliminary resort was necessary, since the interpretation and application of the rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another; (b) the reasonableness of a practice of routing as between higher and lower-rated routes, and (c) uniformity in the application of rates, which is the paramount purpose of the Interstate Commerce Act. But the argument is not sound. To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters. The simple question for decision, as to each shipment, is whether there existed "published through rates" "in effect from point of origin to destination." The determination of that question requires ordinarily merely the examination of the tariffs.[4] The enquiry would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document. This is not a case like *Standard Oil Co., (Indiana)* v. *United States*, 283 U. S. 235, 238, 239, where there was required "consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use." Here, the shippers might have brought their action at law without resort to the Commission.

Third. The shippers urge that the carriers are estopped from contesting the interpretation given by the Commission to the Combination Rule, because in *Cancellation Rule for Constructing Combination Rates on Lumber, etc.*, 81 I. C. C. 745, decided by Division 3 in August, 1923, and affirmed on reargument before the full Commission December 2, 1924, in 93 I. C. C. 614, the carriers vainly sought to have the rule modified so as to overcome the construction given by the Commission. The denial of their application left them remediless by administrative action; but that action in no way pre-

[4] Compare Hohenberg *v.* Louisville & Nashville R. R. Co., 46 F. (2d) 952, 955; Wheelock *v.* Walsh Fire Clay Products Co., 60 F. (2d) 415, 418; Hygrade Food Products Corporation *v.* Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 85 F. (2d) 113, 116.

judiced their right to insist in the courts upon the construction of the rule for which they had contended.

Fourth. The shippers urge that the interpretation given by the Commission should be followed by the Court, because it embodies the settled administrative construction acquiesced in by carriers and shippers. It is true that the Commission has repeatedly declared its adherence to the construction for which the shippers contend. Many carriers acquiesced in that construction, in part possibly, because they preferred to take the lesser amount rather than risk losing the traffic. But the cases cited show that other carriers protested vigorously; and their protests have been persistent.[5]

Fifth. The shippers urge, in support of the Commission's construction, that if application of the Combination Rule is denied, many existing routes, although remaining legally open, will be commercially closed, (compare *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 661), because the combination rates, if not reduced by the Combination Rule would be prohibitively high. Such considerations have no place here, where the sole question for decision is whether there exists a joint through rate over some route between the point of origin and destination. If the route to which alone the joint through rate applies is deemed inadequate, there is ample power in the Commission to establish by proceedings under Paragraph 3 of Section 15 of the Act other through routes with joint rates.[6] Likewise, if the rates on the combination routes are deemed excessive, or discriminatory, there is ample power in the Commission, under other provisions of the Act, to reduce the rates.

Affirmed.

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[5] Compare Cancellation Rule for Constructing Combination Rates on Lumber, etc., 81 I. C. C. 745; 93 I. C. C. 614; McGowin-Foshee Lumber Co. *v.* A., F. & G. Ry. Co., 95 I. C. C. 451; Moore-Marshall Lumber Co. *v.* New Orleans & Northeastern R. R. Co., 112 I. C. C. 33; M. H. Gunther & Co. *v.* Louisville & Nashville R. R. Co., 112 I. C. C. 387; Milne Lumber Co. *v.* New York Central R. R. Co., 152 I. C. C. 65; Held *v.* Cleveland, C. C. & St. L. Ry. Co., 161 I. C. C. 413; Edward Eiler Lumber Co. *v.* Missouri Pacific R. R. Co., 161 I. C. C. 415; Domestic Hardwoods, Inc. *v.* Baltimore & Ohio R. R. Co., 168 I. C. C. 753; Brabston *v.* Louisville & Nashville R. R. Co., 176 I. C. C. 421.

[6] The rule had little application until 1920 when large rate increases were authorized by Ex parte 74, 58 I. C. C. 220.